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THE FUNDAMENTAL LAW OF AMERICAN CONSTITUTIONS

BY
FRED A. BAKER

Of the Detroit Bar and Lecturer on Constitutional Law and History
in the University of Detroit.

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No. 1

PREFACE.

In writing these lectures it has been my constant endeavor to produce an elementary work for the use of students at law and other beginners in the study of constitutional law and history.

To do this with any hope of even a small degree of success, it was necessary to proceed according to the requirements of a logical analysis and gradual development of the subject, and to avoid general history except so far as necessary to understand the great constitutional documents and events which mark epochs in the origin and growth of the constitutional law of the United States.

If these lectures were intended for advanced scholars and professional experts, it would have been a useless waste of space to have included the full text of Magna Carta, the Petition of Right, the Bill of Rights, and other statutes and instruments of constitutional import, but to those who are taking their first lessons, the full text is of the highest importance, as but few can have recourse to the numerous publications where the originals can be found.

Documentary history is the most instructive part of our subject, coupled as it is, with the services of such distinguished characters as Stephen Langton, Simon de Montfort, Edward Coke, John Hampden, James Otis, Alexander Hamilton, James Madison, and others to whom reference is made in the following pages.

Modern research by such great historical scholars as McKechnie, Maitland, Stubbs, Pollock, Medley and others in Great Britain, and Hannis Taylor and George Burton Adams in America, has made the study of constitutional history more interesting and valuable than ever before; and it is not too much to say that every American citizen should become familiar with the subject, and have as good an understanding as each is capable of attaining of the fundamental principles of our written constitutions.

The increase in population by successive generations of children, with the addition of a large influx of the foreign born, coupled with manhood suffrage, and in a number of states with female suffrage, is a serious element of danger, if it is not counteracted by a more thorough instruction in the history of institutions and the essential elements of constitutional liberty.

Some competent person should write a primer on constitutional law, for universal use in the schools and colleges, and which would be of great benefit, if it were on the evening table of every American home.

Not competent to write such a primer, my effort has been to produce such a work as I would like to have had when a student at law, and if a few of those who are seeking to fit themselves for the legal profession find it of some use to them, my highest expectations will be realized.

My prayer is that some of the young men who have listened to these lectures, or into whose hands they may happen to fall, will write more entertainingly and instructively than I have been able to do.

Representative taxation and legislation with power in the courts to enforce the fundamental law, is the best system of government civilized men have ever known, and all attempts to discredit it should meet with strong and persistent opposition.

F. A. B.

Dec. 15, 1914.

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INTRODUCTORY.

Importance of constitutional law in the United States. Constitutional law of a political nature, and constitutional law of judicial cognizance. The study of constitutional law. The division of the constitutional law of the United States into six different subjects: The sovereignty of the people, the division of the powers of government into three co-ordinate branches, the legislative, the executive, the judicative, the reign and rule of law. Illustrations from the constitutional provision prohibiting unreasonable searches and seizures and general warrants.

“Constitutional Law” in its broadest and most general meaning has been described as signifying “A system of fundamental rules and principles for the government of a State, defining the relations and powers of the different parts of the government as between one another and as between the government and the governed.”

Constitutions are either unwritten, partly written or wholly written. The English constitution is usually regarded as unwritten, but there are certain great statutes like Magna Charta, the Petition of Right, the Bill of Rights, and others which are of a constitutional nature, so that it is more correct to say that the English constitution is partly written and partly unwritten. Our American constitutions are wholly written, with this qualification, that some of their principles are implied or assumed to be inherent in our form of government, although not expressed or at least not affirmatively expressed, by any written provision. The main difference between the English constitution and our American constitutions is that the English constitution can be changed by an act of Parliament, but in the United States the

legislative authority has no such power, and our constitutions cannot be altered except in the manner therein provided. No court in England has power to declare an act of Parliament unconstitutional, but in this country the courts have power to declare acts of Congress or state legislatures void, because in conflict with the federal constitution or with the state constitution.

The importance in the United States of a knowledge of constitutional law cannot be overestimated.

The constitution of the United States is the supreme law of the land, and subject to the limitations, imposed by the federal constitution, the constitution of each state is the supreme law of the state.

The supreme law modifies, qualifies and regulates all other law; it controls all judicial, legislative and executive proceedings and actions; it is of the highest value, to judges, legislators and executive officers; and it is not too much to say that no lawyer is qualified to practice his profession unless he is well grounded in the fundamental law of his country; without it he is like a machine without a balance wheel, or a ship without a rudder.

There are two kinds of constitutional law in this country.

1. That kind of constitutional law which is political in its nature and the enforcement of which is not within the jurisdiction of the courts. Thus, the federal courts have no authority to determine the result of a presidential election, or an election or appointment to either house of Congress; nor can they decide whether a constitutional amendment has been legally adopted or whether a republican form of government has been established or exists in any state, or whether a state board of canvassers or a state legislature has correctly determined a state election.

Into this class are also to be included all those provisions of our constitutions which relate to the framework of the government which provide for a senate consisting of two senators from each state, and that no state shall be deprived of its equal representation therein; which provide for a house of representatives, the membership of which is apportioned among the states according to their population; which provide for a president, who, with such subordinate officers as may be provided by law, is to exercise the executive power; which provide for a supreme court, which, with such other courts as may be established by Congress, is to possess the judicial power of the general government.

These and many other provisions of our constitutions, both federal and state, are not of judicial cognizance.

2. The second and more important kind of constitutional law is that which is designed to protect private and public rights, and which it is the peculiar province of the courts to enforce with all the means in their power.

Into this class must be included all those provisions called the "Declaration of Rights;" also those which limit or restrict the power of taxation; also those which draw a line of demarkation between the powers of the general government and the powers of the state governments; and between the powers of the state governments and those constitutionally possessed by counties, cities, townships and villages and school districts; also those which divide our governments into legislative, executive and judicial branches or departments; and numerous other provisions limiting and restraining the governmental power.

THE STUDY OF CONSTITUTIONAL LAW.

The best way is to read constitutional history as a recreation. Have one of the many works on the subject constantly on the table in the room where you spend your evening hours, and before retiring put your mind in a restful condition by reading a few pages of constitutional history.

It is difficult to form an opinion as to which author a student should begin with. My advice is to first read the constitution of the United States and the constitution of Michigan, word for word, from beginning to end, comprehending, understanding and absorbing as much as you can. But you must remember that almost every provision you read has a history back of it, some of it going back beyond the Christian era, and to fully appreciate the full meaning and force of the different provisions, what is implied as well as what is affirmatively expressed, you must study that history.

The constitutional law of the United States divides itself into six different subjects.

1. The doctrine of popular sovereignty.
2. Division of the powers of government into three co-ordinate branches.
3. The legislative.
4. The executive.
5. The judicative.
6. The reign and rule of law.

Each one of these subjects requires a separate lecture, and some of them many more than one.

When reading any of our constitutions, federal or state, have these divisions of the subject in mind, and in that way you will comprehend the scope, the extent and the diversity of the subject and the laboriousness of the work before you. It may be a little tedious at first, but when you get into it you will have more real enjoyment than in the study of any other branch of the law.

Having read the constitution of the United States and the constitution of Michigan, it would be advisable to examine the constitutions adopted by the thirteen original states, and by Vermont, the fourteenth state, before the constitution of the United States was framed. In that way you will obtain a good understanding of the kind of constitution makers, the founders of the republic were; of the spirit that actuated them and the principles of constitutional liberty which governed them.

Early in the eventful year 1776, New Hampshire (Jan. 5, 1776) and South Carolina (March 26, 1776) adopted temporary instruments of government, to continue until an adjustment of their "unhappy differences" and "unnatural contest" with Great Britain could be obtained.

Virginia has the honor of being the first colony to adopt a constitution severing all relations with the mother country, and with no hope or desire for a reconciliation.

A "Virginia Bill of Rights," drafted by George Mason, one of the most distinguished of her revolutionary statesmen, was adopted by a convention composed of the colonial house of burgesses, June 12, 1776, and the balance of the constitution was adopted by the same convention, June 29, 1776, thereby anticipating the Declaration of Independence five days.

The other states followed in the following order:

New Jersey, July 3, 1776.

Delaware, Sept. 21, 1776.

Pennsylvania, Sept. 28, 1776.

Connecticut, Oct. 15, 1776.

Maryland, Nov. 11, 1776.

North Carolina, Dec. 18, 1776.

Georgia, Feb. 5, 1777.

New York, April 20, 1777.

Vermont, July 8, 1777.

South Carolina, March 10, 1778.

Massachusetts, March 2, 1780.

New Hampshire, June 2, 1784.

The colonial charter of Rhode Island was the only constitution of that state until 1842. Connecticut did not do anything more than to adopt a short declaration of rights until 1818. The explanation is that their charter governments were so democratic that state constitutions were not necessary to enjoy independence and participate in the Federal Union.

Your next duty will be to study "The Federalist."

It consists of 85 Essays, written by James Madison, Alexander Hamilton and John Jay, all writing under the name of "Publius." The first number was published Oct. 27, 1787, and the last number Aug. 15, 1788. These essays were written in support of the constitution, when its ratification by the states was under consideration.

From them you can learn what the makers and defenders of the constitution claimed for it.

The constitution met with strenuous opposition, being opposed by such distinguished patriots as George Mason and Patrick Henry in Virginia, by George Clinton in New York, and by many other able men in the several states. The ratification of the constitution by nine states was required, and a confederacy of nine states

was possible, but finally all the states ratified, and the Federal Union became complete.

The original thirteen states and Vermont ratified the constitution in the following order:

Delaware, Dec. 7, 1787.

Pennsylvania, Dec. 12, 1787.

New Jersey, Dec. 18, 1787.

Georgia, Jan. 2, 1788.

Connecticut, Jan. 9, 1788.

Massachusetts, Feb. 6, 1788.

Maryland, April 28, 1788.

South Carolina, May 23, 1788.

New Hampshire, June 21, 1788.

Virginia, June 26, 1788.

New York, July 26, 1788.

North Carolina, Nov. 21, 1788.

Vermont, Jan. 10, 1790.

Rhode Island, May 29, 1790.

It was a protracted struggle, but the constitution finally won, and it became the supreme law from the national boundary on the north to the then national boundary on the south. It was largely due to the personal influence and activity of George Washington, the great ability of Alexander Hamilton and James Madison, the wise counsels of Benjamin Franklin, Samuel Adams and John Hancock, and the legal learning of James Wilson and Theophilus Parsons.

The main objection to the constitution was that it contained no bill of rights, but that objection was overcome by the wisdom and strategy of the friends of the constitution in the Massachusetts convention. They secured a ratification of the constitution, accompanied with a recommendation of amendments to be adopted after the government was organized, providing for a bill of rights.

This plan was of great assistance, if it did not actually determine, the controversy in the great states of Virginia and New York.

To it we are indebted for the first ten amendments, which, taken in connection with the limitations on the general government and on the state governments in the body of the constitution, and the amendments since adopted, we have the greater part of the constitutional law of the United States.

In addition we have the limitations imposed in each state by its own constitution; but outside of the framework of the state governments, and as far as bills of right and the great principles of constitutional freedom are concerned, the state constitutions and the federal constitution are substantially the same. The difference between the state constitutions and the federal constitution is principally this, that the federal constitution is a grant of power, with limitations, and the first question concerning the validity of an act of Congress is whether it is within any of the powers conferred on Congress by the constitution. On the other hand the state constitutions are framed on the theory that the people of each state, and their legislatures, have full power and authority except as far as their power is restricted and limited by the constitution of the United States and by their own constitutions.

The causes which led to the American revolution, and impelled the colonies to fight for independence, and to set up independent state government with constitutions of their own, belong to general history. Like all other revolutions, it was brought about by economic reasons. The trade and commerce of the colonies were being ruined by the restrictions imposed by the British Parliament. The acts are known as the Acts of Navigation and Trade and the Molasses Act. Some of these acts had laid dormant for nearly a century, but when it was an-

nounced that they would be enforced, it caused great excitement in the colonies, especially in New England.

ObeYing instructions from England, the revenue officers of the crown in Boston made an application to the Superior Court of the colony, early in 1761, for writs of assistance to enable them to search wherever they pleased for smuggled goods, from the cellar to the garret of every house. James Otis, a Boston lawyer from Cape Cod, resigned the office of Advocate-General of the Court of Admiralty, and made his famous argument against the application. Otis was a learned lawyer and a tempestuous orator, and the way he sailed into the Acts of Parliament and Writs of Assistance brought him everlasting fame. He reviewed the acts and contended that so far as they imposed duties for revenue they were unconstitutional, because not passed or approved by the legislative authority of the colony of Massachusetts Bay; he indulged in bitter invective against the tyranny of taxation without representation, and asserted that the acts of trade did impose ruinous and intolerable taxes; he denounced general warrants as utterly illegal, that there were no precedents for them; and then, in his enthusiasm, he asserted a doctrine that was to become the great characteristic feature of the constitutional law of the United States.

James Otis said: "All precedents are under control of the principles of law, and no Act of Parliament can establish such a writ, for an act against the constitution is void."

John Adams, then a young lawyer, was present when Otis made his argument, and undertook to make a report of it, but he became so interested in the information Otis was pouring forth that the notes Adams made were imperfect; however, to the end of his life he could by recollection give a more complete synopsis.

There is no doubt about the effect of Otis' argument, not only in Massachusetts but throughout the colonies.

Adams not only heard the argument but witnessed its effect, and in after years was wont to say, "On that day the child Independence was born."

When Virginia started the work of making state constitutions, she put into her Bill of Rights this provision:

"That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted."

Delaware, Pennsylvania, Maryland, Vermont, Massachusetts and New Hampshire, in the order named, followed the example of Virginia; and when the first ten amendments were adopted, as limitations on the general government, the above provision, in fewer words, was included as Art. IV. Now you will find the same provision in the constitution of every state in the Union.

This is probably the best way to study constitutional law, that is, to take up each of the more important provisions of our constitutions, study its history, and ascertain the occasion and object of it.

Here I wish to give you a word of caution. In the United States we have written constitutions; but to a certain extent they are misleading. William E. Gladstone said: "As the British constitution is the most subtle organism which has proceeded from progressive history, so the American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man;" but that tribute is also in some respects misleading.

Our American constitutions for the more part are merely declaratory of certain fundamental principles of

government which are very old, as their origin and development can be traced in history, some of them, from the dawn of civilization. They were immediately derived from the common law and constitution of England, corroborated and supported by the civil and canon law of the ancient Romans. They have been for a time, and may be again, crushed, and apparently destroyed by fire and sword, but sooner or later they will rise, Phoenix-like, from their ashes, and go marching on, shedding their benign influence throughout the world.

The Roman empire as a temporality, or secular power, has disappeared, but the civil law has survived, and is today the basic law of continental Europe, and of Louisiana, one of these United States of America.

The same is true of the great fundamental principles of the common law and the constitutional liberty of England.

The reason for all this is that fundamental law is the product of justice, truth and reason, and is not dependent on written constitutions or legislative enactments. Repeal all the written constitutions in the United States, and their fundamental principles would survive; and they would be found to be "law," in the true sense of that word, in that they are true and right, and, like the laws which control the universe, are immutable, imperishable and eternal.

The fathers of this republic did not invent them, did not cut them out of whole cloth or strike them off; they simply recognized and declared them, and did it in as good and plain English as ever was written. All honor to them; they are entitled to be revered, respected and eulogized as long as grass grows and water runs.

It must not be assumed that the constitutions framed and adopted in the United States were the first attempts

at written constitutions. There were many prior efforts in that direction, and in some future lecture I will pass them in review.

I will bring this lecture to a close by calling your attention to another important feature of our written constitutions. While they are in good English, they have the imperfections of language, and they are based on certain assumptions, and take many things for granted. These are the implied restrictions flowing from the express provisions of these instruments.

Having taken the provision prohibiting unreasonable searches and seizures and general warrants, for one illustration, I will use it for another.

The Michigan constitution says:

“The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place, or to seize any person or things, shall issue without describing them, nor without probable cause supported by oath or affirmation.”

It will be noticed that this provision does not lay down any rule as to when a warrant to search or to arrest is to be necessary. At the common law, arrests for treason or felony could be made without a warrant, but for misdemeanors and other penal offenses, unless the offense was a breach of the peace in view of the officer, a warrant was necessary. The distinction is based on the fact that the higher offenses are more dangerous to society, and are universally recognized as crimes, while the lesser offenses are not so dangerous to the community, and relate more to the mere vices of the people, and frequently are only wrong because they are prohibited by statute or municipal ordinance.

It is a very plain proposition that the provision pro-

hibiting general warrants, and warrants without cause shown, assumes that the common law rule requiring a warrant in cases of misdemeanor not breaches of the peace in view of the officer was to continue in force, and was not to be subject to change by the legislature.

This is a question that has been a matter of controversy in the Supreme Court of Michigan.

In 1887 the legislature passed a drastic law regulating the liquor traffic, and put into it a section authorizing officers to arrest without warrant for certain violations of the act, which were not of themselves breaches of the peace in presence of the officer.

The Supreme Court, in an opinion by Judge Campbell, held this provision unconstitutional. Cramplin, Morse and Long, J.J., concurred. Sherwood, J., dissented.

As it is an instructive exposition of the law of the constitution on the subject, and shows the kind of constitutional lawyer Judge Campbell was, I will read from it. (*Robinson vs. Miner and Haug*, 68 Mich., 549, pp. 55-7-8-9).

Campbell, J., says: "Under our system we have repeatedly decided, in accordance with constitutional principles as construed everywhere, that no arrest can be made without warrant except in cases of felony, or in cases of breaches of the peace committed in the presence of the arresting officer. This exception, in cases of breaches of the peace, has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence, and it was confined, even in such cases, to instances where the violence was committed in the presence of the officer. There are not many such cases. The common and statute law provide for very few specified breaches of the peace, and there are none that are not specified. An indictment charging a person as a peace-breaker, and not with any specified

crime, would be good for nothing. Assaults and riotous conduct make up the largest part of the list. But there can be no breach of the peace within the meaning of the law that does not embrace some sort of violent as well as dangerous conduct. The manifest purpose of this statute is to bring certain things that are not breaches of the peace within that denomination to avoid the necessity of a warrant. But, as already suggested, the constitution cannot be so evaded. The cases covered by the statute present some peculiar features. No doubt keeping open places of sale late in the evening may lead to breaches of the peace, and, when they actually occur in an officer's presence, arrest may be made for that. Most of the acts denominated breaches of the peace by this act are fixed after the regular closing hours at night. An officer arresting without process must, as soon as practicable, take his prisoner before the nearest magistrate, where he can be bailed, or examined, or put on trial, as the case may be. But the arrests provided for in this act would necessarily keep the parties arrested imprisoned until a magistrate could be found, and probably hold them in durance until the next day at least, and subject them to more than usual annoyance. Needless nocturnal arrests are among the greatest abuses which officers can practice, and where, as will sometimes at least be the case, there is no legitimate cause for accusation, and the officer is irresponsible, the wrong is very great and without any adequate civil remedy.

"It was also held in a number of cases which have been famous in history that no general warrants could lawfully issue at common law, and our constitution has embodied that idea in very clear and express terms. But this statute is practically, if carried out, a general warrant itself, directing all officers to visit houses and business places without other authority, and make searches

and arrests, and close up places of business on their own well or ill-founded notion that the law has been violated."

The charter of Grand Rapids, passed in 1885, authorized police officers to arrest without a warrant for violation of the ordinances of the city committed in the presence of the officer, although not breaches of the peace. The validity of this provision came before the Supreme Court in 1894, and the court as then constituted, in an opinion by Judge Montgomery, held it valid. Grant and Hooker, JJ., concurred; McGrath and Long, JJ., dissented in an opinion by Judge McGrath.

Long was the only member of the court who had participated in the prior decision. The result is that nine judges of the Supreme Court passed on the question, and five of them held the legislation unconstitutional, but that does not change the fact that the last decision is authoritative until it is overruled.

The truth is, the implications of our constitutions are very important parts of them, and that a person who, in reading them, can only see or comprehend what is affirmatively expressed makes a great mistake.

Eliminate the assumptions and implications and our written constitutions would be but little more than skeletons, without vigor, without spirit and without life.

In fifteen of the state constitutions trials by jury are secured, but there is no definition or description of the jury. In twenty-three states it is expressly provided that the jury shall be of the vicinage, county or district where the offense was committed. In five states the verdict of the jury is required to be unanimous, and in four states only is the number of the jury fixed at twelve.

In the federal constitution a trial by a jury of the state and district where the offense was committed is required,

but the number of the jury and unanimous verdicts are not mentioned.

The Virginia constitution of 1776 is the only constitution which makes mention of all the elements of a jury trial, viz: "by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be convicted."

When we read any provision of an American constitution providing for a jury, it must be assumed that all three elements of a common law jury were intended, viz., twelve jurors, unanimous verdict, vicinage, unless there are express words to the contrary, as there are in a few states.

Hereafter I will have something to say about jury trials, only alluding to the subject now to show that in construing a constitution we must dig deeper than the express words of the instrument.

Pursuing the course I have indicated, we will mutually engage in the study of constitutional law and history.

BIBLIOGRAPHY.—The Constitution of the United States, and the successive Constitutions of the several states, and the colonial charters which were the constitutions of the English colonies in America, have been (1909) published in seven volumes under the editorship of Francis Newton Thorpe, by the United States Government.

Bancroft's "History of the Formation of the Constitution of the United States" was published by Appleton & Co., of New York, in 1882.

"The Federalist" is in every library, but the most complete and satisfactory edition was published by Lippincott & Co., of Philadelphia, in 1875.

Quincy's Massachusetts Report has an appendix, by Horace Gray, when a member of the Boston Bar, and before he

became a justice and then chief justice of the Supreme Judicial Court of Massachusetts, and then an associate justice of the Supreme Court of the United States, in which he exhaustively reviews the subject of writs of assistance, from the legal point of view.

Gray reached the conclusion that writs of assistance were legal, and, "though contrary to the spirit of the English constitution, could hardly be refused by the Provincial court, **before** general warrants had been condemned in England and before the revolution had actually begun in America."

Lord Mansfield and Lord Camden delivered their famous judgments pronouncing general warrants for persons or papers illegal in England in 1763 and 1765, and it was not asking too much of the Superior Court of Massachusetts to do the same thing in Massachusetts in 1761.

(**Wilkes v. Wood**, 19 St. Trials, 1153; **Leach v. Money**, 19 St. Trials, 1001; **Entick v. Carrington**, 19 St. Trials, 1030.)

THE SOVEREIGNTY OF THE PEOPLE.

The elective franchise and its representative nature—Quizot's classification of governments—Popular assemblies of the ancient Germans as described by Tacitus—Township governments in the United States—Restrictive statute of British Parliament of 1774 (14 Geo. III. c. 45, sec. 7)—Democracy and representative government inseparable—Immutable nature of the fundamental law—Easy methods of amending constitutions objectionable—Initiative and referendum condemned.

Sovereign power is supreme power; it is power that is not subject to any restrictions or limitations whatever. It was exercised by the people of the English colonies in America when the colonies declared their independence and sustained it by force of arms; when each colony as an independent state adopted a constitution of its own making, and when they adopted the Constitution of the United States.

Each of the colonies before the Revolution had a Legislative Assembly, a House of Representatives, and these were continued when the war began, and the voice and will of the people found expression in them. In that way the sovereignty of the people was exercised. Legislative assemblies were then and must ever be the most effective and the only way in which the will of the people as a mass can be expressed and made known.

The preamble of the Constitution of the United States reads:

“We, the People of the United States, in order to form a more perfect Union, establish justice,

insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The preamble, or the body of the instrument, of each State Constitution, expresses the same doctrine, so that we can say, without contradiction, that the first great principle of the constitutional law of the United States is that all the sovereign powers of government are primarily vested in the people; that the supreme power can only be exercised by the people, and that public officials from the chief magistrate of the nation to the most petty officers known to the law, derive their authority from the people as the only source of every power and function of organized government.

The sovereignty that resides in the people is not divided into as many parts as there are persons, or even qualified electors in the nation or State, but it resides in them in their collective capacity as an organized body politic, and they exercise their sovereignty by means of representative assemblies and constituent conventions, the membership of which, although elected by a majority, also represent the minority of the voters, at least to the extent that they give them an opportunity to be heard and pay some respect to their interests.

When we speak of government by the people we do not mean that all of the men, women and children who constitute the State, have a right to directly participate in the government.

In the exercise of the elective franchise the husband and father represents the wife and mother, and their children. The family is the political as well as the social unit. When a son reaches the age of 21 years,

the family has an additional representative in the electorate, or whole body of persons qualified to vote. The evident reason for this is, that men and women who marry and raise a family of children are entitled to a larger representation than those who do not. Another explanation is that the family is given such additional representation on the theory that in the natural course of each son's life he will himself become the head of a family, and as such entitled on his own and their behalf to participate in the elections. As matrimony is a natural state, the right to vote might be withheld from sons until they do marry, without violating any principle of representative government, or popular sovereignty. On the other hand, adult females might be entrusted with the elective franchise, without doing violence to fundamental principles, unless it would have a tendency to weaken family ties, and reduce the social and political unit to the single adult individual.

The home is the center and unit of human existence, around which the best and noblest sentiments of mankind cling and cluster; and the mother is its empress, its supreme ruler.

Whatever the qualifications of electors may be, the non-voting members of each community are represented by the voters of the community; and in that way the sovereignty inherent in all the people, is vested in, entrusted to, and exercised by the qualified electors.

When we say the people as represented by the qualified voters among them are vested with sovereign power we do not mean that the people acting by a majority of votes are sovereign in the sense that whatever they do must be regarded as right. Reason, truth and justice alone are sovereign. Whether the sovereign powers of a

government are vested in one man as in a despotism, or in a few men as in an aristocracy, or many men as in a democracy; or in a combination of all or some of these, in a constitutional monarchy, or a constitutional republic the object sought but never fully attained, is wisdom and justice. The absolutism of a majority is no different in principle than the absolutism of a despot, and representative government is no better than any other, except so far as it is, or may prove to be the more capable of governing wisely and well.

Classifying governments on this basis, Guizot, an eminent French statesman and historian, in his "Representative Government," at page 61, says:

"I distinguish two kinds. First there are those which attribute sovereignty as a right belonging exclusively to individuals, whether one, many or all those composing a society; and these are, in principle, the founders of despotism, although facts, always protest more or less strongly against the principle; and absolute obedience on the one hand, and absolute power on the other, never exist in full vigor. The second class of governments is founded on the truth that sovereignty belongs as a right to no individual whatever, since the perfect and continued apprehension, the fixed and inviolable application of justice and of reason, do not belong to our imperfect nature.

"Representative government rests upon this truth. I do not say that it has been founded upon the full reflective acknowledgment of the principle in the form in which I have stated it. Governments do not, any more than great poems, form themselves on an *a priori* model, and in accordance with defined precepts. What I affirm is, that representative government does not attribute sovereignty as inherently residing in any person—that all its powers are directed to the discovery and faithful fulfillment of that rule which ought ever to govern their action, and that the right of

sovereignty is only recognized on the condition that it should be continually justified.

“‘Plurality which does not reduce itself to unity is confusion. Unity which is not the result of plurality is tyranny.’ This is the happiest expression and the most exact definition of representative government. The plurality is society; the unity is truth, is the united force of the laws of justice and reason, which ought to govern society. If society remains in the condition of plurality, if isolated wills do not combine under the guidance of common rules, if they do not all equally recognize justice and reason, if they do not all reduce themselves to unity, there is no society, there is only confusion. And the unity which does not arise from plurality, which has been violently imposed upon it by one or many, whatever may be their number, in virtue of a prerogative which they appropriate as their exclusive possession, is a false and arbitrary unity; it is tyranny. The aim of representative government is to oppose a barrier at once to tyranny and to confusion, and to bring plurality to unity by presenting itself for its recognition and acceptance.”

Guizot had a long and successful public career in France and was at the head of the government under Louis Philippe for eight years previous to the revolution of 1848 when he was forced into retirement. After referring in his lectures on representative government to the government in France with which he was so familiar, consisting of the royal power, the house of peers and the chamber of deputies, he continues at page 63:

“The publicity of the debates in the deliberate assemblies imposes upon the powers the necessity of commending themselves to the sense of reason and justice which belong to all, in order that every citizen may be convinced that their inquiries have been made with fidelity and intelligence, and that, knowing wherein they are deficient, he may himself have the opportunity, if he has the

capacity, to indicate the remedy. Liberty opens up a career for this inquiry. In this way, every citizen may aid in the discovery of the true law. Thus does a representative government impel the whole body of society—those who exercise power, and those who possess rights—to enter upon a common search after reason and justice; it invites the multitude to reduce itself to unity, and it brings forth unity from the midst of plurality. The public powers—royalty, the deliberative houses, the electors—are bound and incessantly made to return to this work, by the essential nature of their relations, and by the laws of their action. Private citizens even can co-operate, by virtue of the publicity of the debates, and the liberty of the press.”

Guizot was a French Huguenot, but

“he retained not a tinge of the intolerance or asperity of the Calvinistic creed. He respected in the Church of Rome the faith of a majority of his countrymen; and the writings of the great Catholic prelates, Bossuet and Bourdaloue, were as familiar and dear to him as those of his own persuasion, and were commonly used by him in the daily exercises of family worship” (*Reeve, in Ency. Brit.*),

Popular governments are not based on the theory that they will always govern wisely and justly, but on the theory that in the long run they will be oftener right than any other kind of government, and that they can be relied on to correct their own mistakes more implicitly than despotisms, or monarchies or aristocracies can be relied on to correct their mistakes.

All governments are subject to certain inherent restraints. They are restrained by their own conceptions of right and wrong, and by the fact that they may be resisted and overthrown; and the reason why representative government is superior to any other is that it pro-

duces a greater degree of harmony between those who are charged with the functions of government and those who are governed. Under a truly representative system, the government and the people cannot long remain antagonistic to each other, for the people govern themselves.

The doctrine that the supreme and sovereign powers of government are vested in the people is as old, in practice, at least, as the governments which prevailed among the Teutonic tribes inhabiting northern Germany during the century before the commencement of the Christian era, and no one knows how long before.

We derive our principal knowledge of the ancient Germans from the writings of Julius Cæsar, the greatest statesman and general of Roman history, and of Cornelius Tacitus, the Roman historian. Cæsar during the years 55 and 56 B. C. conquered the Gauls, and established the dominion of Rome from the Pyrenees to the Rhine. He found Germans on the west bank of the Rhine, had numerous encounters with them, and drove them across the river. He built a bridge and crossed the Rhine, but only remained in Germany eighteen days. He also invaded Britain, but did not leave a garrison there. Cæsar in his "Bello Gallico" gives a brief account of the Britons and a more extensive description of the Germans.

Tacitus wrote his "Germania" A. D. 98. His account of the Germans does not wholly agree with that of Cæsar, but this is probably due to the fact that at the time he wrote the Romans had a much better knowledge of Germany and its inhabitants than they did in the time of Cæsar.

The German nations did not inhabit cities; they dwelt scattered and separate, as a spring, a meadow, or a grove

might chance to invite them. Their villages were not laid out in rows of adjoining buildings, but every house, such as it was, was surrounded with a vacant space. They were not in Cæsar's time studious of agriculture, although they did raise rye, oats and barley, from which they brewed beer. Their food consisted of wild fruits, venison, beef, cheese and milk. Usury was unknown to them. The arable lands were divided into townships in allotments proportionate to the number of cultivators, and parceled out among the individuals of the district. No one had a portion of land as his own property. The allotments made each year were changed the succeeding year. The reasons for this were that they should not be led, by being accustomed to one spot, to exchange the toils of war for the business of agriculture, and to prevent them from acquiring a passion for possessing extensive domains which would lead the more powerful to dispossess the weaker; to prevent them from constructing buildings with more art than was necessary to protect them from the inclemencies of the weather; to prevent the love of money from arising among them, and in order that the people beholding their own possessions equal to those of the most powerful might be retained by the bonds of equity and moderation.

Cæsar and Tacitus must be read in full to be properly appreciated. But for the purpose of showing the character of the public assemblies of the Germans and their manner of transacting business thereat, we quote chapters or paragraphs 11 and 12 of Tacitus.

TEUTONIC ASSEMBLIES.

“11. On affairs of smaller moment, the chiefs consult; on those of greater importance, the whole

community; yet with this circumstance, that what is referred to the decision of the people is first maturely discussed by the chiefs. They assemble, unless upon some sudden emergency, on stated days, either at the new or full moon, which they account the most auspicious season for beginning any enterprise. Nor do they, in their computation of time, reckon, like us, by the number of days, but of nights. In this way they arrange their business; in this way they fix their appointments; so that, with them, the night seems to lead the day. An inconvenience produced by their liberty is, that they do not all assemble at a stated time, as if it were in obedience to a command; but two or three days are lost in the delays of convening. When they all think fit, they sit down armed. Silence is proclaimed by the priests, who have on this occasion a coercive power. Then a king, or chief, and such others as are conspicuous for age, birth, military renown, or eloquence, are heard; and gain attention rather from their ability to persuade, than their authority to command. If a proposal displease, the assembly reject it by an inarticulate murmur; if it prove agreeable, they clash their javelins; for the most honorable expression of assent among them is the sound of arms.

“12. Before this council is it likewise allowed to exhibit accusations, and to prosecute capital offenses. Punishments are varied according to the nature of the crime. Traitors and deserters are hung upon trees; cowards, bastards and those guilty of unnatural practices are suffocated in mud under a hurdle. This difference of punishment has in view the principle, that villainy should be exposed while it is punished, but turpitude concealed.

“The penalties annexed to slighter offenses are also proportioned to the delinquency. The convicts were fined in horses and cattle; part of the mulct goes to the king or state; part to the injured person or his relations. In the same assemblies chiefs are also elected, to administer justice

through the cantons and districts. A hundred companions, chosen from the people, attend upon each of them, to assist them as well with their advice as their authority" (12 *Works of Tacitus*, Oxford Translation, p. 300).

Some of the ancient Teutonic tribes were monarchical to this extent, that their chiefs were usually chosen from noble families. These chiefs are mentioned by Tacitus as kings, but there is some doubt whether this word conveys a correct conception of their relations to their tribes. Successful leadership and valor in war was the origin of the nobility, but this was coupled with the belief that they were descended from the German God Woden or Odin. The sovereign power was vested in the tribe assembled in a public meeting for the transaction of business as a legislative and judicial body, and the chief, whether chosen from a noble family or not, was the creature of the assembly and subject to its will.

The most remarkable characteristic of the Germans was the chastity of their women and men. The family was everything with them, and uncles and aunts were regarded as occupying a parental relation towards their nephews and nieces. Living in homesteads clustered in villages with a small parcel of land surrounding each dwelling, the arable lands were divided into two or three great fields to allow a rotation of crops, with one field fallow each year, and each family was annually allotted a portion of the fields under cultivation, while the pasture lands were used in common under regulations prescribed by the tribe. Beyond the pasture lands was a strip of waste or unoccupied land which marked the territorial limits, and gave the name of "mark" to the smallest civil and military organization known to the Germans. The mark is the equivalent of the township or parish in England and the United States, and is the political unit

from which arose the hundred, the canton, shire or county, the kingdom, or state, and the union of a number of kingdoms or states into one greater kingdom, or one federal union.

The private ownership of land commenced with the village homestead we have described, and it finally included not only the arable lands, but also the pasture and waste lands. However, there are village communities in Germany to this day where village cow herds, swine herds and goose herds are pastured on lands held in common.

Representative government has for its foundation the markmoot or township assembly beneath the trees and under the blue skies of Germany. The complete survival in the United States of this political and legislative unit is the strength and glory of the nation. The liberties of the people will be safe as long as they preserve to themselves the right to assemble in town meeting and act as a deliberative body.

The following section of a statute enacted by the British parliament and approved by George III., May 20, 1774, for the *better* government of the province of Massachusetts Bay in New England, is more significant and instructive than any argument I might make to show that in the last resort the town meeting is the great bulwark of liberty.

SECTION 7 OF CHAPTER 45, 14 GEORGE III.
(30 Pickering's Stat. at Large, p. 383.)

“And whereas, by several acts of the general court, which have been from time to time enacted and passed within the said province, the freeholders and inhabitants of the several townships,

districts and precincts, qualified, as is therein expressed, are authorized to assemble together, annually, or occasionally, upon notice given, in such manner as the said acts direct, for the choice of selectmen, constables and other officers, and for the making and agreeing upon such necessary rules, orders and by-laws, for the directing, managing and ordering the prudential affairs of such townships, districts and precincts, and for other purposes; and, *whereas, a great abuse has been made of the power of calling such meetings*, and the inhabitants have, contrary to the design of their institution, been misled to treat upon matters of the most general concern, and to pass many dangerous and unwarrantable resolves; for remedy whereof, be it enacted, that from and after the said first day of August, one thousand seven hundred and seventy-four, no meeting shall be called by the selectmen, or at the request of any number of freeholders of any township, district or precinct, *without the leave of the governor* or, in his absence, of the lieutenant-governor, in writing, expressing the special business of the said meeting, first had and obtained, except the annual meeting in the months of March or May, for the choice of selectmen, constables and other officers, or except for the choice of persons to fill up the offices aforesaid, on the death, or removal of any of the persons first elected to such offices, and also, except any meeting for the election of a representative or representatives in the general court; and that no other matter shall be treated of at such meetings, except the election of their aforesaid officers or representatives, nor at any other meeting, *except the business expressed in the leave given by the governor*, or, in his absence, by the lieutenant-governor."

A pure democracy is not possible except in small communities, like a country township with its town meeting, or small cities or villages with their citizens' meetings. In Detroit we had citizens' meetings to vote the annual tax levy, until 1875, when they were found impractic-

able for a large city, and were displaced by a representative board of estimates.

On close examination these public meetings of all the electors of a community are found to be representative assemblies and nothing else. All the voters have a right to attend but only a small portion of the whole number do assemble.

Those who do not attend are represented by those who take enough interest in the affairs of the township, city or village to attend.

When the meeting is organized it is soon found that the leading men, who from their intelligence and ability are able to do so, carry on the debate and conduct the proceedings. Each party or faction is represented by one or more leaders, and while each voter present is entitled to one vote and no more, it soon appears that the leaders have many votes behind them and that the meeting is representative in spite of any theory to the contrary.

The same thing happens in the halls of congress. Whence came such great parliamentary leaders as Henry Clay, Stephen A. Douglas, Thaddeus Stevens and James G. Blaine, each of whom was the recognized representative, not only of his party followers in congress, but at times of more than half of all the people.

Representation by the ablest and best, by those who show the most competency, will continue as long as men are intelligent enough to recognize ability and worth. It is common observation that a legislative body which does not contain any strong, resolute and intrepid leaders, sinks to mediocrity and legislative weakness.

When applied to a populous county or city or to a state or a nation, representative government is abso-

lutely essential to democracy; without it the sovereign powers of the people, would be incapable of intelligent and concentrated exercise.

Representative government gives force to and preserves democracy; they are one and inseparable. In a democracy the people rule, but the will of the people finds expression in representative assemblies. In a republican government, such as we have in the United States, the people rule, and they find their democracy in the principle that one house at least of the legislature, must be composed of members directly elected by the people. This is the character of the federal and state governments established by our American constitutions.

A pure democracy is an objectionable form of government because of its tendency towards anarchy, the forerunner of the military dictator, and the despot. The fathers of the republic did not intend to establish a democracy. Madison undoubtedly expressed their sentiments and intentions when he said in the *Federalist*:

“A common passion or interest will in almost every case, be felt by a majority of the whole; and communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual.

“Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.

“Theoretic politicians, who have patronized this species of government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would at the same time, be perfectly equalized and assimilated in their possessions, their opinions and passions.

“A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.”

This is as true today as at the time it was written, and no candid student of the history of governments can deny it.

The written constitutions adopted in the United States safeguard the democratical tendencies of the people in two ways:

1. They establish a comprehensive system of representation, which compels discussion, caution and deliberation, with their undoubted tendency to produce wise and just results.

2. They created a judicial system with power in the courts to enforce the great principles of reason, truth and justice of the fundamental law.

These are the bulwarks that Washington, Hamilton, Madison and their compeers built to preserve the sovereignty of the people from the pernicious activity of those professional politicians who seek popularity to receive the emoluments of office, to enjoy the lust of power, and to satisfy an egotistic ambition, and of those mercenary newspapers and magazines which court popularity to increase their circulation, and add to the profits of their advertising columns.

Of late years there has been a tendency in framing new state constitutions or revising old ones, to provide for an easy method of amending them, and placing them on a level with ordinary acts of the legislature to be altered, amended or repealed with every passing breeze. The men who framed our first constitutions had a contrary opinion.

The Delaware constitution of 1776 provided that "no article of the declaration of rights and fundamental rules of this state," and the articles giving the colony the name, "The Delaware State," providing for two houses in the legislature, with power to judge of the qualifications and elections of their own members, and to elect their own speakers, prohibiting the importation of slaves, prohibiting the establishment of any one religious sect in preference to another, and making clergymen and preachers of the gospel incapable of holding any office while they continue in the exercise of the pastoral function, "Ought ever to be violated on any pretence whatever."

Other parts of the constitution could be amended with the consent of five-sevenths of the assembly and seven-ninths of the legislative council or senate.

The Pennsylvania constitution of 1776 contained an elaborate provision for the submission by a Council of Censors of amendments to be ratified by a convention elected by the people. The Maryland constitution of 1776, contained this provision.

"That this form of government and the Declaration of Rights, and no part thereof, shall be altered, changed or abolished, unless a bill so to alter, change or abolish the same, shall pass the general assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly, after a new election of delegates, in the first session after such new election; provided that nothing in this form of government, which relates to the eastern shore particularly, shall at any time hereafter be altered, unless for the alteration and confirmation thereof at least two-thirds of all the members of each branch of the General Assembly shall concur."

The constitution provided for the election of four members of the House of Delegates in each county, and

a method of electing senators by which nine were elected from the western shore and six from the eastern shore of Chesapeake Bay.

The counties on the western shore grew in population much faster than those on the eastern shore, but it was found impossible to change the apportionment which resulted in a great constitutional controversy in Maryland.

The North Carolina constitution of 1776 contained this provision :

“That the Declaration of Rights is hereby declared to be a part of the constitution of this state, and ought never to be violated, on any pretense whatever.”

The Vermont constitution of 1777 contained a similar provision.

The Georgia Constitution of 1777 says :

“No alteration shall be made in this constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters of each county within this state, at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties aforesaid.”

The New York constitution of 1777 contained no provision for amendments or for a general revision; nor did the South Carolina constitution of 1778.

The Massachusetts Constitution of 1780 says :

“In order to more effectually adhere to the principles of the constitution and to correct those violations which by any means may be made therein, as well as to form such alterations as

from experience shall be found necessary, the general court (legislature) which will be in the year of our Lord one thousand and seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns and to the assessors of the unincorporated plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments.

“And if it shall appear by the returns made that two-thirds of the qualified voters throughout the state, who shall assemble and vote in consequence of said precepts, are in favor of such revision or amendment, the general court shall issue precepts or direct them to be issued from the secretary’s office to the several towns to elect delegates to meet in convention for the purpose aforesaid.”

The Vermont constitution of 1777, and 1786 adopted the Pennsylvania provision.

The New Hampshire constitution of 1784 made use of the Massachusetts provision in a modified form.

The Federal convention of 1787 provided for amendments proposed by two-thirds of both Houses, and ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other needed of ratification may be proposed by congress.

A convention for proposing amendments is required to be called on the application of the legislatures of two-thirds of the several states.

Since then the Federal plan of a two-thirds vote of each house, has very generally been adopted by the states, accompanied with a ratification by a popular vote. In some states a majority of each house is suffi-

cient, but the proposed amendment must be approved by two successive legislatures.

It is plain to be seen that the object of placing restrictions on the power to amend is to secure care and deliberation, and to prevent hasty and ill considered action.

In 1902 Oregon started a movement in another direction by adopting a provision for amendments by the initiative and referendum method.

South Dakota had adopted the initiative and referendum for the enactment of laws in 1898, but Oregon went a step farther, and included constitutional amendments. The original constitution of Oregon provided for amendments by a majority vote of each house of two successive legislatures, but one of the things accomplished by the initiative and referendum was to omit one of the two successive legislatures, thereby placing the constitution on the same level as ordinary legislative enactments.

The avowed object of the initiative and referendum is to reduce the government to a pure democracy, with the town-meeting, citizens' meetings and other public meetings held for a comparison of views, discussion and deliberation, heretofore incident to democracies, eliminated.

It is doubtful whether a more objectionable form of popular government could be devised. The theory of the initiative and referendum is that the people themselves, without the intervention or advice of their representatives, initiate their own laws and constitutional amendments; but such is not the fact. A coterie or cabal representing no one but themselves can frame a law or an amendment, such as may please their purpose,

and if they can secure a small fraction of the qualified electors, to sign petitions for it, it must be submitted to a popular vote, without the intervention of any deliberative body whatever.

The initiative and referendum has not one redeeming feature; it is one of the hysterical movements of the present time.

Governors are prohibited from interposing their veto, and it is seriously proposed to provide in addition for the recall of judges and judicial decisions on constitutional questions.

Our expectation is that this kind of government will be short lived; that the experiment will be found wanting in merit, that it will prove obnoxious to sane and sound government, and that desuetude will be its grave.

BIBLIOGRAPHY—"The Constitutional Convention," by John Alexander Jameson, a Chicago judge and Professor of Constitutional Law in the University of Chicago, published by Callaghan & Cutter, in 1867, is a valuable work.

His chapter on sovereignty is exhaustive and instructive, with quotations from Rutherford's "Institutes of Natural Law," Dr. Lieber's "Political Ethics," Austin's "Province of Jurisprudence," and other authors, and from court decisions.

"Popular Government," by Henry Sumner Maine, consists of four essays, on "The Prospects of Popular Government," "The Nature of Democracy," "The Age of Progress," and "The Constitution of the United States."

Referring to the restrictions of our fundamental law he says:

"The powers and disabilities attached to the United States and the several states by the Federal

Constitution, and placed under the protection of the deliberately contrived securities we have described, have determined the whole course of American history. That history began, as all its record abundantly show, in a condition of society produced by war and revolution, which might have condemned the great Northern Republic to a fate not unlike that of her disorderly sisters of South America. But the provisions of the constitution have acted on her like those dams and dykes which strike the eye of the traveler along the Rhine, controlling the course of a mighty river which begins amid mountain torrents, and turning it into one of the most equable water ways in the world."

Further on he mentions the provision prohibiting any law impairing the obligation of contracts, and then says:

"We may usefully bear in mind that until this prohibition, as interpreted by the Federal courts, is got rid of certain communistic schemes of American origin, which are said to have become attractive to the English labouring classes because they are supposed to proceed from the bosom of a democratic community, have about as much prospect of obtaining practical realization in the United States as the vision of a Cloud-Cuckoo-borough to be built by the birds between earth and sky."

"Representative Government," by John Stuart Mill, republished by Longmans, Green & Co., of London and New York, in 1907, is an important contribution to our knowledge of the subject. He states his general proposition as follows:

"There is no difficulty in showing that the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government, by the personal discharge of some public function, local or general."

II.

Division of Powers

Virginia constitution of 1776 and the Massachusetts constitution of 1780 divide their state governments into three departments, the legislative, executive and judicative—The constitution of the United States is to the same effect—And so are all the state constitutions—But nearly all of these constitutions give the executive a qualified negative on the legislative—Review of authorities.

The Virginia constitution of 1776 declares:

“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them at the same time, except that the Justices of the County Courts shall be eligible to either House of Assembly.”

The Massachusetts Constitution of 1780 says:

“In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers or either of them: *to the end it may be a government of laws and not of men.*”

The Constitution of the United States does not contain any express provision on the subject, but accomplishes the same result by vesting the legislative powers granted by it, in a Congress consisting of a senate and house of representatives, the executive power in a Pres-

ident, and the judicial power in one Supreme Court and in such inferior courts as the congress may from time to time ordain and establish.

All the state constitutions are to the same effect, either by express provision, or by an actual separation of the departments, or by both methods, so that the division of the powers of government into the legislative, executive and judicative, is an accepted principle of the constitutional law of this country, with the notable exception that the constitution of the United States, and those of some of the states, allow the President or Governor to participate in legislation by giving him a qualified veto power, and under certain circumstances an absolute veto. Thus the Constitution of the United States provides that the veto of the President may be overcome by a two-thirds vote of each house, but it further provides that the President must send his veto message to the house in which the bill originated within ten days, Sundays excepted, from the time it is presented to him for approval. If the bill is not returned by the President within the ten days,

“the same shall become a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not become a law.”

Hence it is, that as to bills passed by Congress and presented to the President during the last ten days of a session of Congress the President has an absolute veto.

All he has to do is to withhold his signature. Such vetoes are derisively called “Pocket vetoes,” but they are absolute in their effect, and have frequently been made use of by our presidents.

The constitution of Michigan contains similar provisions, with the additional very unusual provision that the governor may veto

“any item or items of any bill making appropriations of money embracing distinct items.”

In England the veto power of the King has entirely disappeared, and the executive power has passed into the hands of a responsible ministry, who are the leaders of the dominant party in the Parliament, in which they have seats, thereby commingling the legislative and executive powers, in violation of the maxim that the legislative, executive and judicial powers of the government should not be exercised at the same time by the same persons.

In the United States the negative of the executive on the legislative has been preserved, with a tendency to increase the power of the executive, not only in the general government, but also in the states, and in our municipal governments.

The Kings of England reign but they do not rule.

In the United States the President rules but does not reign; and it is more and more expected of him, that he will be the boss, not only of the Congress, but also of the Supreme Court. Associated with our tendency towards an extreme democracy, is the antagonistic but inevitable tendency towards a strong executive, clothed with an abundance of royal and monarchical prerogatives.

I will have more to say on this subject when we come to consider the executive power. At present we are

more interested in the division of powers as it does exist in the United States as a legal restriction on the different departments of the government.

This division of the powers of government is not an arbitrary one, but is based upon a real and substantial difference in the nature of the powers exercised by a government.

The legislative power is the power to make the law, to repeal old laws and make new laws. The executive power is the power to administer and enforce the laws made by the legislative power. And the judicial power is the power to interpret, expound and apply the law in controversies between persons, and in public suits and prosecutions for violations of the law.

While these definitions are ordinarily sufficient to determine whether any given action of the government is properly within the province of the legislative, the executive or the judicative, there are instances where it is difficult to draw the line, and considerable confusion has resulted, even in the Supreme Court of the United States.

We can best study this subject by reviewing some of the decisions.

The Pension Act of March 23, 1792, imposed on the Circuit Courts of the United States the duty of allowing, and fixing, within certain limits, the amounts of the pensions to be paid soldiers in the revolutionary war.

The Circuit Courts were required to report to the Secretary of War, who was authorized if he had cause

to suspect imposition or mistake to withhold the pension.

Two judges of the Supreme Court and a district judge were the judges of the Circuit Courts.

The Circuit Court of the district of New York, consisting of Chief Justice Jay, Justice Cushing, and Duane, District Judge, held that the duties assigned to the circuit courts were not judicial or directed to be performed judicially, and the act was invalid, but they thought the judges could act as commissioners and in that capacity pass on pension claims.

The Circuit Court for the district of Pennsylvania, consisting of Justices Wilson and Blair, and Peters, District Judge, held that the duties imposed by the act were not judicial and that the court could not proceed under the act.

The Circuit Court of the district of North Carolina, consisting of Justice Iredel and Sitgreaves, District Judge, held the duties were not judicial, and took under advisement the question whether the judges could act as commissioners.

The Attorney General of the United States then applied to the Supreme Court, in behalf of William Hayburn, for a mandamus to compel the Circuit Court for the district of Pennsylvania to proceed to examine Hayburn's pension claim. 2 *Dal.* 409.

The Supreme Court took the case under advisement, but never rendered a decision because another way of allowing pensions was provided by Congress by an act approved February 28, 1793, amending the pension act.

The amendment saved any legal adjudications that had been made by the judges as commissioners, and directed the Attorney General and Secretary of War to obtain an adjudication by the Supreme Court.

Yale Todd had been allowed and paid a pension, and the Attorney General brought an action against him, to recover the money as illegally paid out of the treasury.

The Supreme Court, Chief Justice Jay, and Justices Cushing, Wilson, Blair and Paterson, being present, entered a judgment in favor of the United States.

In the subsequent case of *United States vs. Ferriera*, 13 How. 40, decided in 1851, the court reached the same conclusion in regard to the allowance of claims by a district judge, under the treaty with Spain ceding Florida, and Chief Justice Taney, in a note made a report of the case of Yale Todd, and concluded as follows:

“The result of the opinions expressed by the judges of the Supreme Court on that day in the note to *Hayburn’s* case, and in the case of the *United States vs. Todd*, is this:

“1. That the power proposed to be conferred on the Circuit Courts of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

“2. That as the Act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

“3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States.”

Why is the allowance of a claim against the government not within the judicial power of the Federal courts? Simply because it is essential to a judicial adjudication that there be a party plaintiff and a party defendant and an issue of fact or law.

A court or judge acting on an *ex parte* application must necessarily act as the attorney of the United States, and in reality the government would be deciding its own case. Such is the attitude of an auditing officer, and it is also the attitude of congress, when in the exercise of its legislative power, it allows a claim and makes an appropriation to pay it.

It is a maxim of the law, governing the judicial power, that no one can be a judge in his own case.

In the matter of the allowance of Ferriera's claim by the District Judge in Florida, the United States District Attorney appeared in behalf of the United States and opposed the allowance.

The Supreme Court of the United States disposed of that feature of the case as follows:

"It would seem, indeed, in this case, that the District Judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the District Attorney appeared for the United States and argued the case, and prayed an appeal. But the Acts of Congress require no petition. The claimant had nothing to do, but to present his claim to the judge with the vouchers and evidence to sup-

port it. The District Attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was no doubt his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the secretary. But the Acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court."

Another feature of the judicial power is that an adjudication (subject to review by the court of last resort), is conclusive and final.

Neither the executive or the legislative can be authorized to review, modify or reverse a judicial decision. The very essence of the judicial power is that it decides the matter in controversy, conclusively and finally.

Bound to teach the constitutional law of the United States as it is, I am also bound to teach the constitutional law of this state as it is.

A Michigan statute provides that the state shall pay the fees and expenses of holding inquests on the dead bodies of strangers, "the account of such expenses and fees being first allowed by the Circuit Court of the county." (3 C. L. 1897, Sec. 11828.)

The language is identical with that of the Pension Act of 1792, held unconstitutional by the Supreme Court of the United States, yet, the Supreme Court of Michigan held it valid. Mr. John J. Speed, as circuit judge, to his credit, refused to act on a coroner's account sub-

mitted to him, and the Supreme Court granted a mandamus compelling him to do so. (*Locke vs. Speed*, 62 Mich., 408.)

Judges Sherwood, Champlin and Morse, concurred in this decision. Judge Campbell, dissented, saying:

“I do not think a judge can be compelled, unless he chooses, to perform duties not judicial.”

The question came up again in 1905 in *Toepel's Case*, 139 Mich., 85, and the court followed the prior decision.

In 1893 the Supreme Court of the United States had reaffirmed the decision of the court in *United States vs. Yale Todd* (*In re Sanborn*, 148 U. S. 222).

You may wonder how it was that these learned Michigan judges should disagree with the first and subsequent judges of the Supreme Court of the United States.

Of the first justices of the Federal Supreme Court who passed on the question, Blair, Wilson and Paterson were members of the Federal convention of 1787, and signed the Constitution of the United States. I refer to this to show the tenacity with which the “Fathers of the Republic” stuck to the doctrine that the three departments of the government should be kept distinct from each other.

The only explanation that can be made of the views of the concurring Michigan judges is that they were not well grounded, had never heard of the Federal decisions, and were oblivious to the provision of the state constitution expressly prohibiting the courts from exercising any power other than the judicial, “except in the cases expressly provided in this constitution,” and that as to

the Circuit Courts, the only exception is that the Circuit Judges "may fill any vacancy in the offices of county clerk or prosecuting attorney within their respective jurisdictions, but shall not exercise any other power of appointment to public office."

As is well known to the profession in this state Judge Campbell was better grounded than the other judges, and intuitively reached a correct conclusion. Ability and learning, and a well disciplined mind produce the happiest and best results on the bench, and make the most complete and thorough going lawyer.

It should be the object and aim of every student at law, to become thoroughly grounded, especially in the constitutional law of his state and country.

An act of Congress approved March 1, 1809, prohibited the importation into the United States of any goods, wares or merchandise whatever from any port or place situated in Great Britain or Ireland or in any of the colonies or dependencies of Great Britain, or from any port or place situated in France or in any of her colonies or dependencies, nor from any port or place in the actual possession of either Great Britain or France.

The 11th section of the Act provided :

"that the President of the United States be and he hereby is authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation, after which the trade suspended by this act and by the act laying an embargo, etc., may be renewed with the nation so doing."

That act expired by its own limitation on the 1st of May, 1810, on which day Congress passed an act, the 4th section of which enacted "that in case either Great Britain or France shall before the 31st of March next so revoke or modify her edict as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not within three months thereafter so revoke or modify her edict in like manner" then the act prohibiting importations should be revived "from and after the expiration of three months from the date of the proclamation" of the President, that the one or the other of said nations has revoked or modified her edicts against the United States.

The President, the 2d of November, 1810, issued his proclamation declaring that France had so revoked or modified her edict as that they cease to violate the natural commerce of the United States.

The question was whether the nonintercourse act was revived as against Great Britain three months after the date of the proclamation of the President, that is, whether the nonintercourse act was in force on the 2d day of February, 1811.

The Supreme Court of the United States in the case of the *Brig Aurora*, 7 *Cranch*, 382, held that the nonintercourse act was revived and in full force on the 2d of February, 1811.

It will be observed that the original act provided that it should be suspended on the happening of a certain event which was to be determined by the President and

evidenced by his proclamation, and that the revival act was not to take effect until the happening of a certain event which was likewise to be determined and authenticated by the proclamation of the President. Counsel in the case discussed the question whether this legislation did not confer legislative power on the executive, but the court in a short opinion by Justice Johnson, paid little attention to that question. The court assumed that Congress could determine when and upon what contingencies an act should take effect, or be suspended.

The tariff act of October 1, 1890, put sugar, molasses, coffee, tea and hides on the free list, but provided that after January 1, 1892,

“whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugar, molasses, coffee, tea and hides, raw and uncured or any of such articles, imposes duties or other exaction upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have power, and it shall be his duty to suspend by a proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country for such time as he shall deem just, and in such case and during such suspension, duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country, as follows, namely,—”

The act then proceeded to fix a rate of duty on each of said articles.

The Supreme Court of the United States in *Field vs.*

Clark, 143 U. S. 649, sustained this legislation on the authority of the case of the *Brig Aurora* and a number of legislative precedents. Mr. Justice Lamar with the concurrence of Chief Justice Fuller, filed a vigorous dissenting opinion in which they undertook to show that the precedents relied upon by the majority of the court, fell far short of the discretion vested in the executive by the tariff act of 1890.

Both opinions held that the Congress cannot delegate its legislative authority, but disagreed upon the question whether the legislative power was in this instance delegated.

Where a broad discretion is given to determine whether an act of congress, or of the state legislature, is to take effect, or is to be suspended, it requires some mental effort to understand why there is not a delegation of legislative power; but there are a large number of cases in the law reports where this kind of legislation has been sustained.

A typical case is the Michigan Local Option Law, which is a prohibitory liquor law, but whether it is to be enforced in any county depends on an affirmative vote of the electors, and if once adopted it may be suspended by a negative vote of the electors. Elections under the act may be held every two years, on initiative petitions, canvassed by the county board of supervisors.

This law was sustained by the state supreme court. (*Feek vs. Township Board*, 82 Mich., 393.) Judge Champlin wrote the opinion of the court and Judge Morse filed a dissenting opinion. You should read both opinions as they show the mental processes by which our learned judges reach different conclusions.

At the common law common carriers were required to carry things and persons for reasonable compensation. If a carrier exacted unreasonable charges an action would lie against him, and thus it was that the reasonableness of passenger and freight rates was a judicial question.

In the United States we have two kinds of common carriers, (1) those whose operations are confined to a single state, and are subject to the state government: and (2) those who operate between two or more states, and are subject to the power of congress "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

The question whether a state legislature could fix by law the maximum charges of common carriers, warehousemen, and others engaged in a public service, was decided in the affirmative by the Supreme Court of the United States in *Munn vs. Illinois*, 94 U. S. 113, and in the railroad cases decided at the same time.

In the *Munn Case* the court said:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls and not to the courts."

And in one of the railroad cases the court said:

"As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in *Munn vs. People of Illinois*. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall

in law be reasonable for its use. If it has been improperly fixed the legislature and not the courts, must be appealed to for the change."

Here we have a flat footed and unequivocal decision by the Supreme Court of the United States that governmental rate fixing is a legislative function and nothing else; a matter wholly within the province of Congress and the state legislatures, and not subject to judicial cognizance.

It is not to be wondered at that the legislatures of the states proceeded to exercise the power the court by its solemn judgment had vested in them.

Finding some practical difficulties in fixing schedules of rates in acts of the legislature, some of the state legislatures created railroad commissions, consisting of a board of executive officers, clothed with power to determine the rates railroad companies were to charge. This legislation presented the question whether the legislative power was not delegated to the executive department, but as there is nothing in the Constitution of the United States preventing the states from commingling the powers of government, the Supreme Court of the United States had no jurisdiction to review the decisions of the state courts on that question.

In 1884 the Mississippi legislature passed an act for the regulation of freight and passenger rates on railroads and creating a commission to supervise the same. It authorized the commission to establish rates, and the objection was made that it conferred both legislative and judicial power on the commission in violation of the constitution of the state.

The state supreme court disposed of that objection with these words:

“The Act creating the railroad commission is not violative of the Fourteenth Amendment of the Constitution of the United States, or of any provision of the Constitution of the State, in that it creates a commission and charges it with the duty of supervising railroads.” (*Railroad Commissioners vs. Yazoo and Mississippi R. R. Co.*, 62 Miss., 607, 645.)

The Supreme Court of the United States in disposing of the same objection quoted the latter part of the above, and then said:

“To this we agree and that is all that is necessary to decide this case.” (*Railroad Commission Cases*, 116 U. S. 307, 336).

In 1887 the Minnesota legislature passed an act creating a commission and authorizing it to fix rates, which were to be conclusive and final and beyond judicial inquiry.

The state Supreme Court was of the opinion that the powers and duties, conferred on the commission were not legislative, but executive, and assuming that the Supreme Court of the United States meant what it said in the Munn case, held that the rates fixed by the commission were final. (*State vs. Chicago M. & St. P. R.*, 38 Minn., 281.)

The Supreme Court of Georgia had theretofore held that the duties of the railroad commission of that state were executive and not legislative. (*Georgia R. Co. vs. Smith*, 70 Ga., 694.)

The Minnesota case was reviewed by the Supreme

Court of the United States, and the judgment of the state court so far as it had held, that the determination of the railroad commission was conclusive and final was reversed. (*Chicago M. & St. P. R. Co. vs. Minnesota*, 134 U. S., 418.)

The court said:

“The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is *eminently a question for judicial investigation*, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.”

Justice Bradley with the concurrence of Justices Gray and Lamar filed a dissenting opinion, in which he said:

“But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left

to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express when so declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will.

“Thus, the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

“This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there.”

In 1887 Congress passed an act to regulate commerce and creating the Interstate Commerce Commission, but it did not confer any power on the commission to fix rates. The act provided that all charges for transportation of passengers or property should be reasonable and just, and that unjust and unreasonable charges should be unlawful. It prohibited rebates, drawbacks, or any kind of discrimination, or departure from the schedules or tariffs of rates the carriers were required to publish

and file with the commission, but left the carriers at liberty to fix their own rates.

An effort was made to so construe the act that the commission would have power to fix rates in advance, that is, for the future, but the Supreme Court held that the commission had no such power. (*Interstate Commerce Com. vs. Railway Co.*, 167 U. S., 479.)

The opinion of the court by Justice Brewer at page 499, cited prior decisions of the court to this proposition:

“It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.”

Further on, at page 505:

“The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function.” * * *

“That congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language.” * * *

“Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the Act, does not by implication carry to the commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future.”

In 1906 Congress passed the Hepburn Act amending the act to regulate commerce and giving the Interstate Commerce Commission full authority

“to determine and prescribe what will be just

and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged."

If the authority conferred on the Commission is to be regarded as a legislative power, the above provision is unconstitutional, for it is perfectly clear and beyond question that the legislative power of the Congress can not be delegated. The Supreme Court of the United States has not directly characterized the power of the Interstate Commerce Commission to fix rates and charges for the future, but from references in the opinions of the court in prior and subsequent cases to the commission as an administrative body, it can be inferred that the court regards the power of the commission as executive, in that it is authorized to apply, enforce and execute the mandate of the legislative department of the government that the rates and charges of common carriers shall be just and reasonable. This view of the power of the commission is intelligible and is in accord with the decisions of the state courts on the question, and it would settle the law on the subject if it were not for a subsequent decision of the Supreme Court of the United States to be considered in my next lecture.

BIBLIOGRAPHY. "Politics," by Aristotle, the great Grecian philosopher, was written by him about 330 B. C. A translation by B. Jowett, Professor of Greek in the University of Oxford, was published by the Clarendon Press, Oxford, in 1885. In Lib. IV, C. 14, Aristotle classifies the three elements of a well ordered state under three heads: (1) the Deliberative; (2) the Administrative; (3) the Judicial.

"Spirit of Laws," by Baron De. Montesquieu, was first published in 1748, and a translation by Thomas Nugent of Gray's

Inn, London, was published by Robert Clark & Co., of Cincinnati, Ohio, in 1873.

Montesquieu at p. 174, vol. 1, makes this statement of the reasons which make this division of government necessary.

“When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.

“Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power the judge might behave with all the violence of an oppressor.

“There would be an end of everything were the same man or the same body whether of the nobles or of the people, were to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.”

III.

DIVISION OF POWERS.

(Continued)

Survival of doctrine that fixing rates is a legislative function—A Virginia case—Common law remedies abolished by Interstate Commerce Act—Ministerial power not the same as executive—Whether under the Michigan Constitution of 1908, an act of the legislature is to take immediate effect or not is a legislative and not a judicial question.

The Virginia Constitution of 1902 says:

“Except as hereinafter provided, the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time.”

A subsequent article entitled “Corporations” does make a most sweeping exception. It is the most comprehensive enactment for the regulation and control of corporations, especially transportation and transmission companies, ever put into a constitution. It creates a State Corporation Commission of three members, and vests in the commission, as far as the rates and charges of common carriers are concerned, all of the legislative, executive and judicial powers of the State government. In fact it says:

“The authority of the commission (subject to review on appeal as hereinafter provided), to prescribe rates, charges and classifications of traffic for transportation and transmission companies shall be paramount; but its authority to prescribe other rules, regulations or requirements for cor-

porations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws."

Appeals are authorized to the Virginia Supreme Court of Appeals, but no new or additional evidence can be introduced in the Appellate Court. The Court can order a further investigation by the commission and any additional evidence must be certified to the Court before the appeal is finally decided.

"Whenever the Court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time substitute therefor, such order as, in its opinion, the commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid."

Acting under the authority so conferred on it the State Corporation Commission made an order fixing the passenger rate on all the main lines of railroad in the State at two cents a mile.

Instead of appealing to the State Supreme Court of Appeals, the railroad companies filed bills in the United States Circuit Court to enjoin the Corporation Commission from taking any steps to enforce the order, alleging that the rate of two cents a mile was unreasonable and confiscatory of the property of the companies in the violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

The Corporation Commission filed demurrers and pleas in which they put forward that the proceedings before the commission were in a court of the State, and the

order of the commission could not be enjoined under Sec. 720 of the Rev. Stat. of the United States, which reads:

“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

The United States Circuit Court granted the injunction prayed, and the commission appealed to the Supreme Court of the United States (*Prentiss vs. Atlantic Coast Line*, 211 U. S., 210).

Mr. Justice Holmes delivering the opinion of the court held:

1. That the proceedings before the commission were legislative and not judicial.

“A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind.”

2. The State Supreme Court of Appeals when acting on an appeal from the commission would act in a legislative and not in a judicial capacity.

“And all that we have said would be equally true if an appeal has been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed

upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called."

That the proceedings before the Interstate Commerce Commission or before a State Railroad or Corporation Commission are legislative and not executive or judicial has been recently held by the Supreme Court of the United States in a case from Kentucky. *Louis & Nash. R. R. Co. vs. Garrett*, 231 U. S., 298.

The unanimous opinion of the court is by Mr. Justice Hughes. At p. 305 he says:

"It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. *Interstate Commerce Commission vs. C., N. O. & T. P. Ry. Co.*, 167 U. S., 479, 499; *McChord vs. Louisville & Nashville R. R. Co.*, 183 U. S., 483, 495; *Prentiss vs. Atlantic Coast Line Co.*, 211 U. S. 210, 226; *Knoxville vs. Knoxville Water Co.*, 212 U. S., 1, 8. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body. *Stone vs. Farmers' Loan & Trust Co.*, 116 U. S., 307, 336; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362, 393, 394; *Atlantic Coast Line vs. North Carolina Corporation Commission*, 206 U. S., 1, 19; *Honolulu Rapid Transit & Land Co. vs. Hawaii*, 211 U. S., 282, 291; *Grand Trunk Ry. Co. vs. Railroad Commission of Indiana*, 221 U. S., 400, 403."

At page 307:

"The contention is that, before the commission makes such an order, it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than is just and reasonable; it is to give notice and a hearing; it is to 'hear such statements, arguments or evi-

dence offered by the parties' as it may deem relevant; and, it is in case it determines that the carrier is 'guilty of extortion' that it is to prescribe the just and reasonable rate. Still, the hearing and determination, viewed as prerequisite to the fixing of rates, are merely preliminary to the legislative act. To this act, the entire proceeding led; and it was this consequence which gave to the proceeding its distinctive character. Very properly, and it might be said, necessarily—even without the express command of the statute—would the commission ascertain whether the former or existing rate was unreasonable before it fixed a different rate. And in such an inquiry, for the purpose of prescribing a rule for the future, there would be no invasion of the province of the judicial department. Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members or specially constituted bodies, upon whose report as to the reasonableness of existing rates it would decide whether or not they were extortionate and whether other rates should be established, and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts. It is 'the nature of the final act' that determines 'the nature of the previous inquiry.' *Prentiss vs. Atlantic Coast Line*, 211 U. S., 210, 227."

These rulings by the Supreme Court of the United States upset all our theories in regard to the nature of the power of commissions to fix the rates and charges of common carriers; and we must hunt for an explanation. No fault can be found with the rule of the common law or of a legislative enactment, that the rates and charges of com-

mon carriers should be just and reasonable. The difficulty was that the common law remedy by an action at law, proved to be, under modern railroad conditions, utterly inadequate and worthless. It was incumbent on the legislative branches of our Federal and State governments to provide a remedy. This they undertook to do, and the Supreme Court of the United States has held that the remedies furnished by the Interstate Commerce Act exclude and abolish the common law remedy by actions at law. (*Texas & Pac. R. v. Abilene Cotton Oil Co.*, 204 U. S. 426.)

It being finally settled that fixing a rate for the future is legislative, and that the question whether it is reasonable or not cannot become a judicial question until after it has been legislatively fixed, the question arises, what becomes of the intermediate power of a commission to fix rates. I think this is the answer.

The Interstate Commerce Commission, or a State Commission with similar powers, does not exercise either the legislative, executive, or the judicial power. The function of the commission is to ascertain a fact, and to announce its conclusion, and thereupon the rate so ascertained goes into effect, as a rate of the legislative department, and not as the rate of the commission. The commission acts as a mere agency of the legislative to ascertain a fact, it does not legislate, or adjudicate, or exercise an executive discretion. Congress might use a committee of the House of Representatives or a joint committee of the two houses to do the same work, and it would not be considered a delegation of its own power. A commission of this kind is a mere ministerial agency of the legislative department and its act, its rate, is the action and rate of that department.

Nothing can be clearer than that the legislature cannot delegate to a commission the power to fix a rate of taxation, yet, in Michigan a state board ascertain the average rate of taxation in the state, and the rate so ascertained is imposed upon the railroad property in the state, not as taxation imposed by the board, but as a tax levied by the legislature.

This was first attempted by legislation, but the act was held unconstitutional (*Pingree v. Auditor General*, 120 Mich. 95.)

That was a test case to determine the validity of a railroad bill passed by the Legislature in 1899.

The constitution of the state was then amended so as to authorize the conferring of the power to ascertain the average rate on a state board of assessors, and such an act was passed in 1901.

The railroad companies contested the validity of the amendment and the act, in the Federal Courts, where it was held that the board acted in a mere ministerial capacity, and the rate ascertained by the board, became the rate of the legislature, and that it was not necessary to convene the legislature to add its formal approval. (*Mich. Cent. R. R. vs. Powers*, 201 U. S. 245.)

There is but little of any difference between the words "executive" and "administrative," but the word "ministerial" has a much narrower meaning; it is usually applied to official duties which do not involve the exercise of any judgment or discretion, except to a very limited extent. It can be used to describe the power of the Interstate Commerce Commission, and of state commissions having power to fix rates.

It has been so used by the Supreme Court of Michigan in an opinion by Justice Stone, a learned and able jurist.

In *Mich. Cent. R. Co. vs. Mich. R. Com.*, 160 Mich., 355, at page 363, he says:

“It is held that the functions and duties of such commissions are administrative or ministerial, and neither legislative, executive or judicial.”

The Supreme Court of the United States has very clearly shown the difference between executive discretion and action, and a ministerial duty, *Mississippi vs. Johnson*, 4 Wall. 497, where it is said:

“A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple definite duty, arising under conditions admitted or proved to exist, and imposed by law.”

We conclude therefore that the power conferred on the Interstate Commerce Commission, and on state railroad commissions, to ascertain certain facts, and conditions, and when they are found, to apply the remedy of annulling, approving or establishing rates of freight and fare, is a ministerial duty or function, and not an executive or judicial duty or power. The inquiry the commission makes as to the facts is a preliminary investigation such as might be made by a legislative committee, but its final action in fixing rates for the future is an exercise of the legislative power by the congress or the state legislature. The commission is the mere ministerial agent of the legislative, and is not a legislative agent exercising a delegated power in violation of the constitution, nor

is it an executive board enforcing a law or a court exercising judicial power.

Where the state constitution, like that of Virginia, expressly authorizes the state court, when it vacates an order of the commission, fixing rates, to itself fix reasonable rates for the future, the power so conferred on the court must be regarded as an exception from the rule that the courts can only exercise judicial power. When the Virginia Supreme Court of Appeals on appeals to it, from the State Corporation Commission, fixes the rates, it exercises legislative power, because the constitution says it may and commands it to do so.

The constitution of Michigan confers no such power on the state courts, and the Supreme Court of the state has held that, although the legislature may have authorized them to do so, the state courts cannot fix rates; that when a state court vacates an order of the railroad commission fixing rates it must refer the matter back to the commission to fix other rates. *Michigan Central R. Co. vs. Circuit Judge*, 156 Mich., 459, 470.

The court has adhered to that ruling and it is settled constitutional law in this state. *Detroit and Mackinac Railway Co. vs. Michigan Railroad Commission*, 144 N. W., 689; 178 Mich.

This is in accord with the ruling of the Supreme Court of the United States that fixing rates for the future is a legislative function.

While an order of a commission fixing rates is a legislative act, it does not follow that the commission, as a ministerial agency of the legislature, has the same power

as the legislature to pass laws without a hearing or only such as it sees fit to grant.

This is a matter on which we have the instruction of the Supreme Court of the United States.

The original interstate commerce act provided that the commission could entertain complaints against common carriers; that a full hearing should be given the parties; and that the commission should "investigate the matters complained of in such manner and by such means as it shall deem proper."

The commission was required to make a report in writing, and include therein the findings of fact upon which the conclusions of the commission were based.

"Such findings so made shall thereafter in all judicial proceedings be deemed prima facie evidence as to each and every fact found." (24 *U. S. Stat.*, 379, 384.)

The Hepburn Act of 1906 (34 *U. S. Stat.* 384), amending the Interstate Commerce Act, omitted the next above clause of section 14, and made other amendments to the act increasing the power of the commission; which induced the commission, and the Department of Justice, to contend that the findings and orders of the commission were conclusive and final; and they argued that inasmuch as the commission was authorized to make investigations on its own account, and having been given legislative power to make rates it can act as congress would on information so obtained, and therefore its findings must be presumed to be supported by such information, although not formally proved at the hearing.

The court in an opinion by Mr. Justice Lamar rejected the argument and overruled the contention of the com-

mission and its counsel. *Int. Com. Comm. vs. Louis. & Nash. R. R.*, 227 U. S., 88.

The court held that if the commission obtained information of its own the parties must be apprised of the evidence of it, and be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation and rebuttal.

The court further held, that the legal effect of evidence is a question of law, and if the commission made an order when there was no evidence to support it, the court should set it aside.

The court said :

“But the statute gave the right to a full hearing, and conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved.

“A finding without evidence is arbitrary and baseless.

“And if the government’s contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body or tribunal under our government.

“It would mean that where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat.

“Such authority, however beneficially exercised in one case, would be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution’s condemnation of all arbitrary exercise of power.”

I have gone over this subject of rate making because the course of the controversy shows the wisdom of our constitutions in separating the government into three co-ordinate branches. When each works within its own

province, the final results are wise and salutary. It would not do to vest the absolute power in any one man or body of men, or in any one department of the government. It is true the judiciary have the final say, but the power of the courts is subject to important limitations; they would not undertake to decide on the credibility of witnesses or other conflicts of evidence; they would only interfere when the legislative or executive acted without evidence or on wholly inadequate evidence, and thereby exceeded their own jurisdiction and power, by arbitrary, tyrannical, and confiscatory proceedings.

Rate making has been, and for years to come, will be a subject of protracted litigation, and sooner or later if you prove to be successful lawyers, you will have to deal with it.

A case has lately arisen and been decided in Michigan from which a student at law can derive much instruction in constitutional interpretation.

The state constitution of 1908 retains the provisions of that of 1850, dividing the powers of government in three departments, and that

“no person in one department shall exercise the powers belonging to another, except in the cases expressly provided in this constitution.”

The express provisions of the constitution of 1850 gave the governor a qualified negative on the legislative, gave the Senate power to try impeachments presented by the House of Representatives, and gave the legislature in joint convention the power to determine contested elections for governor, lieutenant governor and state officers.

The constitution of 1908 contains a new express provision.

“The legislature shall pass no local or special act in any case where a general can be made applicable, and whether a general act can be made applicable shall be a judicial question.”

Another new provision reads:

“No act shall take effect or be in force until the expiration of ninety days from the end of the season at which the same is passed, except that the legislature may give immediate effect to acts making appropriations, and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house.”

In 1909 the legislature passed a general law for the incorporation of cities, but did not give it immediate effect.

In 1913 this law was amended by the legislature, and it was declared that the amending act was immediately necessary for the preservation of the public peace, health and safety; and it was given immediate effect, from the date of its approval by the governor March 11, 1913.

Acting under authority conferred by the amending act certain amendments to the charter of the city of Detroit were proposed by the common council and approved by the electors at the spring election on the first Monday of April, 1913.

The principal question in the case of *Attorney-General, ex rel Barbour vs. Lindsey*, decided Jan. 24, 1914, 20 D. L. N., 1167, was whether the amending act did take immediate effect.

Four opinions were delivered.

Justices Ostrander and Bird held that the question whether an act should be given immediate effect was a matter of legislative discretion, and the determination of the legislature was conclusive and final and could not be reviewed by the courts. Justice Kuhn had given an opinion to the same effect, when attorney-general, and for that reason did not sit in the case. Three of the eight judges of the court are of that opinion.

Mr. Justice Brooke was of the opinion that the action of the legislature was not conclusive, and it could be reviewed by the court; but he held that in this case the legislature acted within its discretion. He said:

“I do not think it can be said with certainty that the act in question was not immediately necessary for the preservation of the public peace, health or safety, and the courts should interfere only where that conclusion is inevitable.

“It is clear that in any event the act (if otherwise unobjectionable) would become a valid enactment after the expiration of ninety days from the date of adjournment.”

Mr. Justice Moore delivered an opinion in which he agreed “in the main with what is said by Justice Brooke,” but disagreed with him on another question in the case, that did not involve the immediate effect clause.

Justices Stone and Steere signed the opinion of Justice Moore. Six of the seven judges sitting in the case, and seven of the eight judges of the court, are of the opinion that the amending act did take immediate effect.

That was the “main” thing in the opinion of Justice Brooke, and it is probable that Justices Moore, Stone and Steere intended to approve that part of the opinion of Justice Brooke in which he held that the court had jurisdiction to overrule the action of the legislature, but

when he held that in this instance the legislature had not exceeded its authority, what he said as to the power of the court to overrule the decision of the legislature became an *obiter dictum*.

An authoritative decision of that question cannot be had until the court disagrees with the legislature, and actually annuls an immediate effect clause in an act. If you want to know the difference between an authoritative decision and *obiter dicta*, read Judge Christiancy's opinion in *Don Moran vs. People*, 25 Mich., 356, 364.

An *obiter dictum* is not binding on the judge responsible for it, or on the judges who concur with the result of his opinion.

Chief Justice McAlvay, a very able and courageous judge, agreed with Justice Brooke, that the court had jurisdiction to overrule the legislature, and completely demolishing the argument that there was an immediate necessity for giving the amending act immediate effect, held the action of the legislature invalid, and going a step farther, he held that there being no immediate necessity, the whole amending act, and all proceedings under it were void.

The strength of this opinion is that it is logically consistent from beginning to end, for it cannot be positively asserted that the legislature would have passed the same kind of an act, if it had known that it could not be given immediate effect. The presumption is the other way and what Justice Brooke said on that question is the judgment of the court as it received the approval of four of the seven judges who heard the case.

Mr. Justice Brooke, in his opinion, says that those who framed the new constitution could and wisely should “have made their intention clear and put all misgiving at rest by simply declaring that this should be a legislative and not a judicial question.”

The answer to which is that the constitutional convention and the people by their vote of ratification did express their intention with clearness and absolute certainty.

When the legislature gives immediate effect to an act it exercises the very same kind of legislative power as when it passes the act. This particular power not being expressly excepted from the legislative, it is governed by the provision that no person in one of the three departments shall exercise the powers of the other departments.

There being no possible ground on which it can be held that giving immediate effect to an act is not an exercise of legislative power, there is no room for construction, because the constitution in this particular construes itself; it lays down a positive rule.

Mr. Justice Brooke refers to the provision that an act may embrace but one object which shall be expressed in its title, and he says,

“no one would claim that a question arising under this provision of the constitution should not be determined judicially yet the basic law is silent upon the point.”

The reply to this is that the provision confining acts of the legislature to one object, relates to the form of legislation. The title and the body of the act are before the court, and whether the constitutional provision has

been complied with is a plain legal question. The court has no occasion to go outside of the act.

This is not so as to the clause relative to giving immediate effect to acts. There it must be assumed that the legislature made some inquiry as to conditions prevailing in the state or some part of the state, and with knowledge of such conditions, comes to the conclusion that immediate effect is necessary. Its action relates to the operation of the act, to the time it is to take effect, and as our constitution does not require the legislature to set forth the grounds or reasons for its conclusion, the court is not in a position to annul the action of the legislature, which may be based upon conditions *aliunde* the record or face of the act.

These intellectual scraps on the bench are a good omen because they indicate that all the judges are taking an active interest in each decision of the court. Dissenting opinions are reassuring because they show that the objections to the conclusion of the majority have been urged upon the court by one of its own members and not left to the sometimes inadequate arguments and contentions of counsel.

I am a strong believer in and an upholder of the power of the courts to invalidate acts of the legislative in conflict with the fundamental law; but it is important that the judiciary in exercising this power confine themselves to their province, and not encroach on the legislative, except in cases where it is plain that the constitution has been violated. That is the general attitude of all our courts, both federal and state; that it is the attitude of the Supreme Court of Michigan is shown by its decision that the legislature was within its discretion and province when it gave the amending act immediate effect.

Future legislatures will give immediate effect to acts, some of which will be clearly within the discretion to be exercised by the two houses. As to other acts there may be honest differences of opinion, and litigation will ensue with the result that the people of the state will not know when any such act takes effect until long after it has taken effect by the expiration of the ninety days period from the end of the session.

This in my judgment would be a greater evil than any the constitutional provisions on the subject were designed to remedy.

When an act is to take effect ought to be definite and certain from the start, and not be left to run the gauntlet of the courts.

Experience will show that the opinion of Justice Ostrander, approved by Justice Bird, and ex-Attorney-General, now Justice Kuhn, is the better opinion.

Protracted controversy produces the best results. As has been well said: "Time is the mother of truth."

The constitution of Illinois provides that the legislature shall pass no local or special act where a general act can be made applicable, but does not provide that whether a general act can be made applicable shall be a judicial question.

The constitutions of seventeen or eighteen states are in this particular the same as the constitution of Illinois; and it has been uniformly held that the courts have no power to overrule the determination of the legislature.

Whether a general law can be made applicable or not,

in the absence of an express constitutional provision to the contrary, is a question for the legislative.

Owners of Lands vs. People, 113 Ill, 296.

Sanitary District vs. Ray, 199 Ill. 63.

Johnson vs. Comrs. 107 Ind. 15.

State vs. County Court, 50 Mo. 37.

Ensworth vs. Curd, 68 Mo. 282.

David vs. Faines, 48 Ark. 370.

State vs. Hitchcock, 1 Kan. 178.

Carpenter vs. People, 8 Cal. 116.

The only case to the contrary I have been able to find, is an overruled case in Indiana (but I do not say there are no others.)

This condition of the law led the state of Missouri, in 1875, Minnesota in 1892, Kansas in 1906, and Michigan in 1908, to make the question whether a general law can be made applicable a judicial question.

As the Michigan constitution does not make the question whether an act should be given immediate effect or not a judicial question there is no escape from the conclusion, that it is a question for the legislature, and not for the courts.

In my first lecture on the division of the government into three co-ordinate branches, I alluded to the fact that the English constitution departs from this principle, in that the Prime Minister and the Cabinet have become vested with the executive power and the members of the cabinet have seats, a voice, and votes in the parliament.

In England they have the shell of an hereditary monarchy, but its original kernel has been dug out and a representative government put in its place and the English constitution as it now exists, is one of the most demo-

cratic in the world. The Premier and his associates in the Cabinet known as the "Government" are the leaders of the dominant party in the House of Commons, and they can lead just so far as the Commons permits them to do so but no farther. When there is an adverse vote in the House on an important measure supported by the ministry, the Prime Minister resigns or the parliament is dissolved, and a general parliamentary election is held to ascertain the will of the nation.

This is a most admirable system, especially adapted to English conditions, and it has been adopted in Canada and nearly all the English colonies, and by France and Belgium and other countries. The main object and purpose of the Social-Democratic party in Germany is to establish it there, so as to make the ministry responsible to the Reichstag instead of to the Kaiser.

In the United States we elect a President every four years, and a House of Representatives every two years, whether there is any occasion for it or not. It cannot be said that the government of the United States is less responsible to the will of the nation than the British, but the periodicity of our elections is a great nuisance and a blemish.

You will have to study the practical workings of the two systems a long time before you will be able to form an opinion.

It is a subject concerning the political constitutional law of the United States, and has but little to do with that part of our constitutional law which is within the jurisdiction of the courts.

As applied to the provisions of our American Constitutions designed to protect private and public rights, I

have no doubt in my own mind but that the division of the powers of government into the legislative, executive and judicative, is of the highest value and of very great utility, and has all the merits attributed to it by Aristotle and Montesquieu.

BIBLIOGRAPHY. "The English Constitution," by Walter Bagehot, the second edition of which, with a lengthy introduction, was written in 1872, is a very instructive and interesting work, as the author aimed "to trace out the working of natural causes and inherent principles," and his book "is pervaded by the scientific spirit without taking on the technical terms of scientific exposition."

"Constitutional Limitations," by Thomas M. Cooley, Michigan's own most distinguished jurist, is the best work with which I am familiar, on the restrictions, the Division of Powers, places upon the legislative, the executive and judicative. He gives elaborate treatment to each of these departments, and cites numerous court decisions, and these have been enlarged in the notes to the seventh edition by Victor H. Lane, Professor of Law in the University of Michigan.

IV.

THE LEGISLATIVE.

The origin and development of the great constitutional doctrine, that the power to tax and to legislate, can only be exercised by a legislature, one house of which must be directly and immediately elected by the people—Charter of Henry I.—The events which led to Magna Charta—Archbishop Langton's great services in advising and encouraging the Barons.

The third great principle of American constitutional law is that there can be no valid taxation or legislation, except by a legislature (whether called a parliament, a congress, a general court or assembly, or a legislature, or by any other name), one house of which must consist of representatives immediately and directly elected by the people.

While in any logical analysis of constitutional principles this is the third in the list, it is first in practical importance.

The most continuous and stupendous struggle in the development of a system of government, in all history, is that of the peoples who speak the English language, in their efforts and final success in establishing the great doctrine of representative taxation and legislation.

The sacred nature of the rule that one house of the legislature must be composed of members immediately elected by the people, can not be fully understood and appreciated without studying the progressive history which resulted in its establishment.

It would be interesting to go back to the invasion of Britain by the Jutes, Saxons and Angles after the Roman legions were withdrawn, and to follow the history of the Anglo-Saxons down to the Norman conquest, but it is sufficient on this occasion to say that there had been developed in England, before the coming of William the Conqueror, a decided tendency towards the feudal system, and that the Norman Kings brought that system into full force and vigor, although with some modifications from the feudo-vassalism of the continent.

The King was the supreme land owner, and all the land was held by him either immediately or mediately. He had his tenants and they had their tenants as sub-tenants, and so on down to the actual occupiers of the land.

Those who held immediately of the King were his tenants in chief, and they had their tenants in chief, and there were cases where there were as many as nine lords, above the tenant who actually cultivated the soil.

The essential feature of the whole system was the rendition of services for a grant of land. The king's tenants in chief held their land by tenure of military service, knight's service as it was called, which obligated them to furnish one or a number of fully armed warriors for the king's army.

Sub-tenants were under a similar obligation, and in this way the king directly and through the sub-tenants obtained a small but efficient force of armed troops.

Then there were other services of a non-military character which the tenants were required to render, such as the duty to attend the court of the lord to act as the

suitors or judges, and the doing of agricultural work or the payment of rent, in kind or in money.

Tenants by military service occupied nearly all the land in England and the plan was adopted of allowing it to be commuted for by a payment in money which was called scutage, or service by the shield.

One of the incidents of feudal service was that when a tenant died, and his heir was a minor, and unable to perform the services due from his land, his lord became his guardian, and was entitled to the rents and profits of the land, provided he committed no waste, and if he held under several lords, the lord from which his family derived their most ancient title to the land was entitled to the guardianship.

One of the results of this guardianship was the right to control the marriage of the ward, especially of an heiress, for the lord was interested in preventing her from marrying a cripple, or an enemy of his.

Another incident of feudal service was the payment of a relief to the lord on a change of ownership by inheritance or otherwise. At first the relevium was a matter of bargain between the lord and tenant, but was subsequently fixed at 100 shillings for a knight's fee, and 100£ for a barony. A barony was an aggregation of manors, held by a great earl or baron.

Another thing connected with feudalism was the payment made to the lord by his tenants to aid him on special occasions or for a special purpose, such as knight-
ing the lord's eldest son, the marriage of his oldest daughter, or a contribution towards the relief which the

lord owed to an overlord, or for ransoming the lord from captivity; and for other purposes.

This short and very imperfect statement of the English feudal system was necessary to understand in a general way the two constitutional documents of the feudal period, the charter of Henry I. and the Magna Charta of King John.

To understand all the different tenures under which land was held in England recourse must be had to Littleton on Tenures and Coke on Littleton.

CHARTER OF HENRY I.

In the year of Our Lord, 1101,—Henry, Son of William, by the Grace of God, King of the English, since the death of his brother, William:

To All the Faithful, Greeting:

1. Know that by the mercy of God and the common consent of all the barons of the kingdom of England, I was crowned as king of said Kingdom; and it is oppressed by gross abuses, I, in the presence of God and because of the love I bear you, grant full liberty of the Holy Church of God, so that its property can neither be sold nor rented at the death of an archbishop, bishop or abbot, and that nothing can be accepted by me from the property of the church or from any member of its clergy, before its successor has been appointed.

I abolish all the wicked customs by which the Kingdom of England has been oppressed, which bad customs I here particularize.

2. At the death of any of the barons who hold from me or of any one who hold from my barons, his heir shall not succeed to his estate as was done in the time of my brother, but he shall take only after a lawful payment of the charge thereon. Likewise, all tenants under my barons shall become

seized of the enfeoffed lands, only after an equitable settlement with their lords of the charges thereon.

3. If any of my barons or any of those who hold under my barons should wish to marry his daughter, his sister, granddaughter or any of his kindred, he shall confer with me about the same, but I can receive nothing for the granting of a license to marry or forbid the marriage taking place, except if the purpose is to marry her to an enemy of mine.

And, if at the death of any of my barons, or any of those holding under my barons, his daughter happens to succeed to his estate, with the advice of my barons, I shall allow her to marry and become seized of her inheritance.

And, in case of her husband's death, the surviving wife, if there are no children, shall have her dower and the right to remarry, and I shall not give her in marriage without her consent.

4. If the surviving wife has children she shall have her dower and the liberty of remarrying as long as her estate is of legitimate descent, and I shall not give her in marriage unless with her consent; and the guardianship of her children and the administration of the estate shall be either exercised by the wife or by any other kinsman who may be deemed more suitable.

And I order that my barons act in the same manner towards the sons, daughters or wives of their tenants.

5. The common moneyage which was seized throughout the state and counties which was not in the reign of King Edward, this I will not in any manner from thenceforth at all defend. If any one shall be taken, either a moneyer or another, with false money, then let right and justice be done.

6. All the choses in action and all the claims in favor of my brother, I release; except the claims I have in my own name, or which were in favor of some other person and sought to be enforced in the name of my brother. And if any charge on the estate of any one has been heretofore released, I confirm all such releases if made in good faith.

7. And if by reason of being disabled for military service,

any of my barons was subject to the payment of any dues in money, I hold the same as having been paid.

If any one bound to military service was incapacitated by sickness to do so, and has not paid any money contribution, nor made any disposition to have that money paid, his wife, children or kinsmen and administrators shall apply that money according to his intention as well as they can construe it.

8. And if any of my barons or my subjects commits a trespass, he shall not give a money pledge for his acquittal as used to be done in the times of my father, or my brother; but he shall make amend according to the character of his offense as was done prior to the time of my father when my remoter ancestors reigned. But if convicted of treason or felony, his punishment shall be according to justice.

9. I forgive all prior homicides committed up to the day I was crowned as king; but those committed since shall be punished according to the law under King Edward.

10. I retain the title to the forest lands according to the common consent of the barons, in the same manner as my father held them.

11. To the knights, I grant their lands free of all charges and servitude in order that by the relief of such burdens, they may have more time to practice horsemanship and the handling of arms for the end of being at my service in the protection of my kingdom.

12. I command that peace be kept in all my kingdom.

13. I restore the laws of King Edward as amended by my father with the consent of his barons.

Should any one have taken possession of some of my property or that of any one else, after the death of my brother, King William, it must be immediately restituted, and any one persisting in retaining the same, if found, shall be caused to make severe amend upon conviction.

Witnesseth, before Mauritius, bishop of London, Gundufus, bishop, and William, Bishop elect, Counts Henry, Simon, Walter Gifford, Robert of Monfort, Roger and Henry of Porte in London, where I was crowned.

Hume, the historian, referring to this charter, says:

“To give greater authenticity to these concessions, Henry lodged a copy of his charter in some abbey of each county, as if desirous that it should be exposed to the view of all his subjects, and remain a perpetual rule for the limitation and direction of his government; yet it is certain that, after the present purpose was served, he never once thought, during his reign, of observing one single article of it; and the whole fell so much into negligence and oblivion, that, in the following century, when the barons, who had heard an obscure tradition of it, desired to make it the model of the Great Charter which they exacted from King John, they could with difficulty find a copy of it in the kingdom. But as to the grievances here meant to be redressed, they still continued in their full extent; and the royal authority, in all those particulars, lay under no manner of restriction. Reliefs of heirs, so capital an article, were never effectually fixed till the time of Magna Charta, and it is evident that the general promise here given, of accepting a just and lawful relief, ought to have been reduced to more precision, in order to give security to the subject. The oppression of wardship and marriage was perpetuated even till the reign of Charles II; and it appears from Glanville, the famous judiciary of Henry II, that in his time, where any man died intestate—an accident which must have been very frequent when the art of writing was so little known—the king, or the lord of the fief, pretended to seize all the movables, and to exclude every heir, even the children of the deceased; a sure mark of tyrannical and arbitrary government.”
(1 *Hume's His. Eng.*, 243-244.)

So far as the charter of Henry I is descriptive of the feudal system and undertook to improve it and to redress

the grievances of the Barons it is instructive and interesting; but there is very little in it designed for the protection or benefit of the common people, beyond the restoration of the laws of King Edward as amended by William, the Conqueror. This did not mean the laws enacted by Edward, the Confessor, but the laws of the Anglo-Saxons, which prevailed in the time of that king.

The fifth paragraph relating to the tax called "moneyage," and the coinage has a constitutional importance both in England and America which has been overlooked by historians.

It shows that more than a century before Magna Charta a constitutional declaration was made denouncing debasements of the coinage.

Ruding (*Annals of the Coinage of Great Britain*, Vol. 1, p. 189) in his account of the treatment of the coinage by Henry I, says that "he, soon after his accession ordained by charter wise and politic regulations, evidently calculated for the benefit of his subjects. Amongst these were the abolishing of moneyage, an oppressive tax, of Norman origin, and unknown in the time of Edward the Confessor, and the denouncing severe punishment against moneyers or other persons, on whom counterfeit coins should be found. In his laws it was ordained that falsifiers of the money should suffer the loss of a hand without redemption."

In a note Ruding gives this account of the tax called moneyage. "There was formerly a payment of twelve pence, every three years, due from each hearth in Normandy for moneyage and forage, or the privilege of cutting wood in the forests for fireing. It seems almost

peculiar to that duchy and was paid or at least one part of it that the money might not be changed; for in those times the seigniorage, which was taken upon every alteration of the coins was highly oppressive, and it was therefore commuted for by this tax. It was introduced into England either at the time of, or soon after the Norman Conquest."

A moneyer was a person who was employed or authorized by the king to coin money, and the payments made by the moneyers for the privilege of coining were known as "moneyage," in Latin "monetagium." The tax paid to the king as the consideration for his keeping the coin pure, was also known as moneyage, and it was in this sense that the word "monetagium" was used in the fifth section of the charter of Henry I. This meaning of the word has been overlooked by some translators, and they have not seen the real import and constitutional significance of the section. It was a solemn declaration by the king that in the exercise of his prerogative of coining money he would not debase the coinage, and that any of his moneyers who should do so should be severely punished.

The Charter of Henry I. does not contain one word conferring upon or reserving to the barons any control over or participation in the enactment of the laws, or the imposition of taxes, or the administration of justice. All the powers of government are assumed to be vested in the person of the king. He renounces the right to levy the tax called "moneyage" but beyond that he makes no grant or promise of any kind except such as concern his relations to his feudal tenants, and their relations to their tenants. The feudal system is in full force, and the king is the absolute sovereign of England. The govern-

ment is as far removed from the democratical system of the Anglo-Saxons and the ancient Germans as it could be; and it is from the absolutism of the Norman Kings of England, that we must trace the gradual growth and development of constitutional principles until that development resulted in the system of representative government which now prevails in the United States of America.

During the Norman period the power of taxation was not as important as it subsequently became, for the reason that under the feudal system the king derived large revenues from his landed estates. The kings of the West Saxons became the kings of England because they held more land and had more tenants than the other kings of the heptarchy, and they could lead a greater host in war.

William the Conqueror confiscated the estates of Harold as king of England and earl of Wessex, and also a large number of other estates, and was himself the lord of as many as fifteen hundred manors. The Norman kings received a large income from their hereditary revenues, and it was only to meet extraordinary expenditures that they made tax levies, which were not dependent on the consent or approval of the great council of the realm, although it was at times obtained.

The compilers of the Parliamentary History of England were not able from their examination of the records to state the taxes levied by William the Conqueror, or by William Rufus. Their summaries of the taxes levied during each reign commence with that of Henry I.

“In the reign of Henry the First, the Conqueror’s youngest son, taxes were levied arbitrarily on the sub-

ject as in the two preceding reigns of his brother Rufus and his father. In his sixth year he set a sum upon every parish church and forced the incumbent to pay the money to redeem his church. In the eighth year of his reign he had for the marriage of his daughter Maud 3 s. for every hide of land. And, say historians, during his whole reign he levied a constant annual tax of 12 d. on every hide of land. It does not appear by any account we can meet with that the king asked the consent of his barons or people for raising these subsidies; though there were some conventions of the estates of the realm called in his time." (1 *Parl. Hist.* 9.)

The reign of Stephen was the most turbulent in the history of England. A bloody contest for the throne was carried on, and no regular taxes were levied. Plunder was the resort of the king, of the barons, and of the invading forces of Matilda and her son Henry.

In the reign of Henry II. taxes were raised "as arbitrarily as before; in the beginning of it there was a scutage, but there is no account what it amounted to. A second scutage was made in the fifth year of his reign, amounting to 180,000£. In his seventh year a third scutage was raised of two marks every knight's fee. In the twelfth 2 s. in the pound for the first year, and one penny a pound for four years after, of all rents and movables. In the 14th year of his reign, a fourth scutage of a mark a knight's fee. In the 18th, a fifth scutage, uncertain what it was. In the last year of this king's reign, a tenth on all movables for the crusade." (1 *Parl. His.*, p. 16.)

The tax for the crusade against the Turks and Saracens for the recovery of the Holy Land, appears to have

been the first tax to which the estates of the realm gave their consent. The same tax had been levied in Normandy, but the undertaking was abandoned and it is likely that in England the tax was not collected.

Richard I. as soon as he was crowned began to make preparations to join the king of France and the Emperor of Germany in the third crusade. He convened the bishops, earls and barons of the realm and laid before them the invitation of the French king to join him in the Holy War, and Richard and his peers readily agreed to accept it.

“The most of this king’s short reign was spent in this crusade; as well as a great part of the nation’s money. In the first year of it a scutage of twenty shillings was laid on every knight’s fee. In the second, for the armament to carry on the war, two saddle horses and two sumpter (pack) horses were taken of every city; of every abbey, one saddle horse and one sumpter horse; and of every manor of the king’s the same as the abbies. For his ransom when prisoner to the Emperor of every knight’s fee, twenty shillings; a fourth part of the rents of the laity; a fourth part of the rents of some clerks, and a tenth of others; all the gold and silver the churches had; and all the wool of that year the Cistercians had, as well as the monks of the order of Sempringham, who were never taxed before. The sum the Emperor demanded for King Richard’s ransom was one hundred and forty thousand marks of silver.

“For liberty of tournament, every earl gave twenty marks, every baron ten marks, every landed knight four marks, and every knight of fortune two marks. In the years 1185 and 1196 were raised the sum of one million,

one hundred thousand marks but not said how; also an aid of five shillings of every plow-land.

“Great sums were also raised by seizures, fines and compositions and sale of demesne lands. So much money went out of the kingdom on this expensive crusade, and for the king’s ransom, that not one genuine coin of this king’s stamp is to be met with in the collections of the curious.” (1 *Parl. His.* 18.)

The barons at the convention which accepted the invitation of the French king to join the Crusade undoubtedly gave their consent to the scutage of twenty shillings for every knight’s fee laid for the purpose of raising money to carry on the war.

Their consent to the crusade was the result of their religious enthusiasm, and it was sought by the king, and the convention was called, for the purpose of enlisting the English people in the effort to rescue the Holy Land.

After the king was ransomed and he had returned to England he called a parliament which met at Nottingham, March 27, 1194, “On the third day, the parliament granted to the king two shillings from every plough-land in England; besides, he required a third part of the service of every knight’s fee for his attendance in Normandy, and all the wool that year of the Cistercian monks, which being judged too hard, he compounded with them for a fine.” (1 *Parl. Hist.* 18.)

John, the successor of Richard, proved to be one of the most tyrannical, quarrelsome and luckless of kings. He quarreled with the King of France and lost Normandy; he quarreled with the Pope and was compelled to make the most abject submission; he quarreled with

his barons, and was forced to grant "Magna Charta," and he had no sooner set his sign manual to that instrument and the army of the barons had dispersed, than he set about to repudiate the grant and to make war against the barons. In the midst of the struggle, he died. "A Knight without truth, a King without justice, a Christian without faith."

The compilers of the Parliamentary History of England do not give us a summary of the taxes levied during the reign of John, but inform us that in 1204 a meeting of the nobles was called at Oxford, and "Here was granted to the King two marks and a half of every knight's fee; nor did the bishops or abbots or other of the clergy, depart without promise of the same." (1 *Parl. Hist.* 20.)

In a note on page 23 it is said: "There were several scutages in this King's reign, but as they were arbitrarily and variously collected, they do not deserve notice."

Bishop Stubbs in his Constitutional History of England was able to give us more of the history of taxation from the Norman conquest to the granting of the Great Charter, than is to be found in the Parliamentary History.

At page 302, Vol. 1, he says, "William, whose besetting vice was said by his contemporaries to be avarice, retained the revenues of his predecessors and added new imposts of his own.

"The ordinary revenue of the English King had been derived solely from the royal estates and the produce of what had been the folkland with such commuted payments of feorum fultum, or provision in kind as repre-

sented either the reserved rents from ancient possessions of the crown, or the quasi-voluntary tribute paid by the nation to its chosen head. The Danegeld, that is, the extraordinary revenue arising from the cultivated lands—originally levied as tribute to the Danes, although it had been continued long after the occasion for it had ceased,—had been abolished by Edward the Confessor. The Conqueror not only retained the royal estates, but imposed this Danegeld anew. In A. D. 1084 he demanded from every hide of land not held by himself in demesne, or by his barons, a sum of six shillings, three times the old rate.”

At page 623, referring to the fact that in 1163 the ancient Danegeld disappears from the rolls, but was succeeded by a tax under the name of *donum* or *auxilium* he says: “Under Richard the same tax appears under the name of *carucage*: the normal tax being levied on the *carucate* instead of the *hide*, and each *carucate* containing a fixed extent of one hundred acres.

“Each of these names represents the taxation of a particular class: the *scutage* affects the tenants in chivalry; the *donum* or *hidage* or *carucage*, affects all holders of land; the *tenth*, *seventh* and *thirteenth* all the people in the realm. Each had its customary amount; the *scutage* of 1156 was twenty shillings on the fee; those of 1159 and 1161 were two marks; the *scutage* of Ireland in 1171 was twenty shillings, and that of Galloway in 1186 at the same rate. The *scutages* of Richard’s reign—one for Wales in the first year and two for Normandy in the sixth and eighth,—were in the first case ten, in the other cases twenty shillings: John in his first year raised a *scutage* of two marks; on other occasions he demanded the same sum, besides the enormous fines which he extorted from his barons on similar pretexts.”

Scutages in John's Reign.

First scutage in reign—	1198-9	2 marks for Knight's fee
Second	“ “ “ 1200-1	2 “ “ “ “
Third	“ “ “ 1201-2	2 “ “ “ “
Fourth	“ “ “ 1202-3	2 “ “ “ “
Fifth	“ “ “ 1203-4	2 “ “ “ “
Sixth	“ “ “ 1204-5	2 “ “ “ “
Seventh	“ “ “ 1205-6	20s “ “ “ “
Eighth	“ “ “ 1209-10	2 “ “ “ “
Ninth	“ “ “ 1210-11	2 “ “ “ “
Tenth	“ “ “ 1211-12	3 “ “ “ “
Eleventh	“ “ “ 1213-14	3 “ “ “ “

During previous reigns the normal scutage was 20s and it was only exacted in extraordinary emergencies, and not as a yearly burden. Sometimes it was only one mark (13s. 4d.) and even as low as 10s.

In 1212 John instituted a great inquest throughout the land to discover every Knight's fee in it, and then exacted a scutage of three marks (40s.), or double the normal.

The arbitrary and excessive taxation levied upon the barons and the people by John was one of the principal reasons for their revolt, and they had a great and wise counsellor and advisor in the Archbishop of Canterbury.

Stephen Langton was an Englishman who had been educated in France, and had become noted there for his learning and piety. Pope Innocent III. invited him to Rome, and made him a cardinal. He was obtruded on England and his authority was established there, by

the power of the church, and the ability and persistency of Innocent III., the greatest of all Popes; but nevertheless he proved to be a true hearted Englishman, and in the struggle of the barons with the king, neither the threats of his temporal or spiritual superiors could deter him from the patriotic performance of his duty to his countrymen. To him, more than any other man, the English people are indebted for the Great Charter, which contained the germs of constitutional liberty, and is the fruitful source of its most enduring principles.

Before Langton would grant absolution to the king, he compelled him to swear that he would abolish all illegal customs, restore the good laws of his predecessors, particularly those of Edward the Confessor, give just and true judgment to all men, and restore to all their rights.

A council was soon afterwards convened at St. Albans, August 4, 1213, at which Geoffrey Fitz-Peter, John's chief justiciar, presided. Fitz-Peter was a man trained in the school of Henry II. under Glanvill and Hubert Walter. He had great influence with the barons, and held them true to the king in his controversy with the church. The chief justiciar was ex-officio regent in the absence of the King, and he presided at this council because John had sailed, or was about to sail, on an expedition against France. As a result of the council, proclamations were issued in the king's name ordering an observance of the laws of Henry I., and denouncing the punishment of death against all sheriffs, officers of the royal forests, and other ministers of the crown who should exceed the strict limits of their authority.

The reference to the laws of Henry instead of those

of Edward has been a matter of comment, but it was probably due to the justiciar, and his superior legal learning, and possibly it was made out of deference to the prejudices of some of the Anglo-Norman barons, who may have preferred the name of a Norman law-giver to that of a Saxon one. Whatever the reason, it shows the connection of the Charter and laws of Henry I. with Magna Charta at the very inception of the movement which resulted in the grant by King John of the last named instrument.

Another council of some of the principal barons was held at St. Paul's, London, August 25, 1213, at which the archbishop showed them a copy of the Charter of Henry I. He exhorted them to insist on the renewal and observance of it. The barons swore that they would sooner lose their lives than depart from so reasonable a demand.

The barons clearly saw that the Charter of Henry I. furnished both a safe standing ground and a precedent for a deliberate scheme of reform.

Fitz-Peter laid the claims of the council before the king, but died almost immediately after. The influence which had stood between the king and barons was at an end, much to the relief of John, who exclaimed with an oath, that now for the first time he was King of England, little realizing that the death of his faithful servant would soon result in his own discomfiture.

Early in 1214, John went to Poictou and carried war into the dominion of Philip Augustus of France. During his absence the confederacy of the barons spread wider and wider. In response to a summons from Lang-

ton they met in large numbers at St. Edmondsbury, under color of devotion. The archbishop “again produced to the assembly the old Charter of Henry; renewed his exhortations of unanimity and vigor in the prosecution of their purpose; and presented in the strongest colors the tyranny to which they had been so long subjected, and from which it now behooved them to free themselves and their posterity.”

“The barons, influenced by his eloquence, incited by a sense of their own wrongs, and encouraged by the appearance of their power and numbers, solemnly took an oath, before the high altar, to adhere to each other, to insist on their demands, to make endless war on the king until he should submit to grant them.”

“They agreed that after the festival of Christmas, they would prefer in a body their common petition; and in the meantime they separated, after mutually engaging that they would put themselves in a posture of defense, would enlist men and purchase arms, and would supply their castles with the necessary provisions.

“The barons appeared in London on the day appointed, and demanded of the king that, in consequence of their own oath before the primate, as well as in deference to their just rights, he should grant them a renewal of Henry’s charter and a confirmation of the laws of St. Edward.

“On the feast of Epiphany, John at the Temple received a deputation from the barons and heard their demands; smothering his indignation, he requested a truce until the first Sunday after Easter. As the time for the king’s answer approached, the barons assembled an army at Stamford, and as soon as the truce expired

they proceeded to make war on the king. John was at Oxford and sent the archbishop and William Marshall to the barons with a message desiring to know what those liberties were which were so zealously challenged from their sovereign. These messengers at once brought back a long schedule of demands, which were no sooner shown the king than he burst into a furious passion and refused to grant them.

The warlike preparations went on, and a decisive battle was about to take place, when the king yielded, and at Runymede, June 15, 1215, agreed to the treaty or grant, known as Magna Charta. (1 *Hume's His. Eng.* 422-249), (1 *Stubb's Consti. His. Eng.* 563-569), (*Creasy's Eng. Consti.*, 98-117.)

Magna Charta is a feudal constitution and nothing else. It was made by the barons for the barons, and as a charter of liberties it is not much more than a myth; but it is a great document; it was drawn by an expert in feudal law; and it is of the highest value as showing what that law was in the reign of King John. Otherwise its historic value consists of what flowed from it, of the evolution which proceeded from it, and the germs planted in it from which were derived two or three of the leading principles of constitutional representative government.

At this time I only I only wish to call your attention to the fact that it does not contain one word relative to the power of taxation or legislation; but it does contain two paragraphs, (chap. 12 and 14) relative to feudal services and dues, which finally led after some centuries, to representative taxation and legislation.

By the 14th chapter the common council of the king-

dom was to consist of the king's tenants in chief, but a distinction was drawn between the greater and the lesser barons. The greater to be personally summoned, and the lesser to receive a general summons through the sheriffs. This distinction was also maintained in the practical administration, the greater barons accounting directly to the king at the exchequer, for the scutages and aids due from them and their subtenants, and the lesser barons accounting to the sheriffs who made their returns to the exchequer.

Scutages and aids were the only dues mentioned, but these were in the nature of taxes, imposed at the request of the king and with the consent of the common council, for the support of his government.

Scutages were originally a commutation for personal military service, but subsequently they included any tax ratable imposed on knight's fees.

For a short time after he granted the great charter, King John seemed to fully acquiesce; he retired to the Isle of Wight, but it was only to wait for an opportunity to avenge himself. The barons were lulled into a state of inactivity and discord, and John promptly took advantage of the situation. He sent a messenger to Rome with a copy of the charter and obtained from the Pope a bull pronouncing the instrument null and void.

Clothed with this authority he hired an army of foreign mercenaries and made war against the recalcitrant barons. In desperation they appealed to Philip the King of France, who allowed his son Lewis to invade England in an effort to obtain the crown. While the war was going on John died, October 16, 1216.

John's son, Henry III., was only nine years old, and William Marshall, the earl of Pembroke, was Marshall of England, and by virtue of his office, he was at the head of the military forces of the crown.

At a council held at Bristol November 11, 1216, he was appointed regent, and the next day the charter was re-issued in the king's name. Some changes were made but not many, the principal one being that chapters 12 and 14 were wholly omitted, and were never replaced.

There have been attempts at explaining this, but it is difficult to say just what the Regent, and Archbishop Langton and his other advisers, had in mind. The facts were that the French invaders were in possession of half of England and it would require a supreme effort and all the power of the crown to expel them.

The Great Barons knew that leaving out chapters 12 and 14 would not abolish the common council of the realm; and for the time being at least they did not care to be bothered with the Lesser Barons.

There are a number of opinions why the Lesser Barons were included in the common council. Some contend that the Great Barons, desired to induce the lesser to attend. Others think that the Great Barons expected that the lesser would not attend because of the expense and burden of attendance. Others contend that the expectation was that the lesser barons would send up members to represent them.

By omitting the 12th and 14th chapters the Greater Barons were left in possession of the government, and through the Regent, ruled the land.

They won a decisive victory over the French at the Battle of Lincoln May 19, 1217, and Lewis was compelled to sue for peace. He surrendered all the national archives in his possession and withdrew his forces, the Regent paying him 10,000 marks to help him along. Thereupon, Nov. 6, 1217, the Great Charter was re-issued, with a separate Forest Charter.

It was again re-issued Feb. 11, 1225, with little modification, and this is Magna Charta in its final form, which is printed in the English statutes, and is referred to in the courts of law, and in law books which deal with it.

Thus we see that the Great Charter did not secure to the English people, a parliament clothed with the power to tax and to legislate. Parliamentary government was still to come.

BIBLIOGRAPHY. "Magna Charta, a Commentary on the Great Charter of King John with an Historical Introduction," by William Sharp McKechnie, Lecturer on Constitutional law and history in the University of Glasgow, was published by James Maclehose and Sons, of Glasgow, in 1905.

This work was written by a competent author from the standpoint of modern research, and no one can know what the meanings of Magna Charta were in 1215, until he has read McKechnie's book.

"The Origin of the English Constitution," by George Burton Adams, Professor of History in Yale College, published by the Yale University Press, New Haven, Conn., in 1912, is a recent and valuable addition to Magna Charta literature.

V.

THE LEGISLATIVE.

(Continued.)

Full text of Magna Carta as translated by McKechnie—
Comments thereon—The importance of obtaining a good
understanding of the Great Charter as a starting place in the
study of constitutional history and law.

In order that students at law, and other readers may
have Magna Carta in a convenient volume, it is deemed
best to here insert the full text.

MAGNA CARTA.

(1215)

PREAMBLE.

"John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greeting. Know that, looking to God and for the salvation of our soul, and those of all our ancestors and heirs, and unto the honour of God and the advancement of holy Church, and for the reform of our realm, (we have granted as underwritten) by advice of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church, Henry archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops; of master Pandulf, subdeacon and member of the household of our lord the Pope, of brother Aymeric (master of the Knights of the Temple of England), and of the illustrious men, William Marshall, earl of Pembroke; William, earl of Salisbury; William,

earl of Warenne; William, earl of Arundel, Alan of Galloway (constable of Scotland); Waren Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh (seneschal of Poitou), Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip of Albini, Robert of Ropesle, John Marshall, John Fitz Hugh, and others, our liegemen.

1. "In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English church shall be free, and" shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III., before the quarrel arose between us and our barons, and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

2. "If any of our earls or barons, or other holding of us in chief by military service shall have died, and at the time of his death his heir shall be of full age and owe 'relief,' he shall have his inheritance on payment of the ancient relief, namely the heir or heirs of an earl, £100 for a whole earl's barony; the heir or heirs of a baron, £100 for a whole barony; the heir or heirs of a knight, 100s. at most for a whole knight's see; and whoever owes less let him give less, according to the ancient custom of fiefs.

3. "If, however, the heir of any one of the aforesaid has been under age and in wardship, let him have his inheritance without relief and without fine when he comes of age.

4. "The guardian of the land of an heir who is thus under age, shall take from the land of the heir nothing but reasonable produce, reasonable customs, and reasonable services, and that without destruction or waste of men or goods; and if we

have committed the wardship of the lands of any such minor to the sheriff, or to any other who is responsible to us for its issues, and he has made destruction or waste of what he holds in wardship, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall be responsible to us for the issues, or to him to whom we shall assign them; and if we have given or sold the wardship of any such land to someone and he has therein made destruction or waste, he shall lose that wardship, and it shall be transferred to two lawful and discreet men of that fief, who shall be responsible to us in like manner as aforesaid.

5. "The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, places for livestock, fishponds, mills, and other things pertaining to the land, out of the issues of the same land; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and implements of husbandry, according as the season of husbandry shall require, and the issues of the land can reasonably bear.

6. "Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.

7. "A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

8. "Let no widow be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

9. "Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the securities of the debtor be dis-

trained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the securities shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.

10. "If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond.

11. "And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessities shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to other than Jews.

12. "No scutage nor aid shall be imposed in our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the citizens of London.

13. "And the citizens of London shall have all their ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

14. "And for obtaining the common counsel of the kingdom anent the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, by our letters under seal; and we will moreover cause to be sum-

moned generally, through our sheriffs and bailiffs, all others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

15. "We will not for the future grant to any one license to take an aid from his own free tenants, except to ransom his body, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

16. "No one shall be compelled to perform greater service for a knight's fee, or for any other free tenement, than is due therefrom.

17. "Common pleas shall not follow our court, but shall be held in some fixed place.

18. "Inquests of novel disseisin, of mort d'ancestor, and of darrein presentment, shall not be held elsewhere than in their own county-courts, and that in manner following: We, or, if we should be out of the realm, our chief justiciar, will send two justiciars through every county four times a year, who shall, along with four knights of the county chosen by the county, hold the assizes in the county court, on the day and in the place of the meeting of the court.

19. "And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders who were present at the county court on that day, as many as may be required for the efficient making of judgments, according as the business be more or less.

20. "A freeman shall not be amerced for a small offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of his offence, yet saving always his 'contenement'; and a merchant in the same way, saving his wares—and a villein shall be amerced in the same way saving his wainage—

if they have fallen into our mercy; and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

21. "Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offence.

22. "A clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his church benefice.

23. "No community or individual shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.

24. "No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown.

25. "All counties, hundreds, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.

26. "If any one holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed to us, it shall be lawful for our sheriff or bailiff to attach and catalogue chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of lawful men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.

27. "If any freemen shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under the supervision of the church, saving to every one the debts which the deceased owed to him.

28. "No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

29. "No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.

30. "No sheriff or bailiff of ours, or any other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. "Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

32. "We will not retain beyond one year and one day, the lands of those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.

33. "All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea coast.

34. "The writ which is called *praecipe* shall not for the future be issued to anyone, concerning any tenement whereby a freeman may lose his court.

35. "Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to-wit, 'the London quarter'; and one width of cloth (whether dyed or russet, or halberget), to-wit, two ells within the selvidges; of weights also let it be as of measures.

36. "Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied.

37. "If anyone holds of us by fee-farm, by socage, or by burgage, and holds also land of another lord by knight's service, we will not (by reason of that fee-farm, socage, or burgage), have the wardship of the heir, or of such lands of his as is of the fief of that other; nor shall we have wardship of that fee-farm, socage, or burgage, unless such fee-farm owes knight's

service. We will not by reason of any petty serjeanty which anyone may hold of us by the service of rendering to us knives, arrows, or the like, have wardship of his heir or of the land which he holds of another lord by knight's service.

38. "No bailiff for the future shall put any man to his 'law' upon his own mere word of mouth, without credible witnesses brought for this purpose.

39. "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him unless by the lawful judgment of his peers and by the law of the land.

40. "To no one will we sell, to no one will we refuse or delay, right or justice.

41. "All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

42. "It shall be lawful in future for any one (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as is above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy—reserving always the allegiance due to us.

43. "If one who holds of some escheat (such as the honour of Wallingford, of Nottingham, of Boulogne, of Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall give no other relief, and perform no other service to us that he would have done to

the baron, if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it."

44. "Men who dwell without the forest need not henceforth come before our justiciars of the forest upon a general summons, except those who are impleaded, or who have become sureties for any person or persons attached for forest offences.

45. "We shall appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.

46. "All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long-continued possession, shall have the wardship of them, when vacant, as they ought to have.

47. "All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river-banks that have been placed 'in defence' by us in our time.

48. "All evil customs connected with forests and warrens, foresters and warreners, sheriffs and other officers, river-banks and their wardens, shall immediately be inquired into in each county by twelve sworn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, be utterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

49. "We will immediately restore all hostages and charters delivered to us by Englishmen, as sureties of the peace of faithful service.

50. "We will entirely remove from their bailiwicks, the relations of Gerard de Athyes (so that in future they shall have no bailiwick in England), namely Engelard de Cygony, Peter, Gyon, and Andrew of the Chancery, Gyon de Cygony, Geoffrey de Martyn with his brothers, Philip Mark with his brothers and his nephew Geoffrey, and the whole brood of the same.

51. "As soon as peace is restored, we will banish from the kingdom all foreign-born knights, cross-bowmen, serjeants, and mercenary soldiers, who have come with horses and arms to the kingd'om's hurt.

52. "If any one has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace. Moreover, for all those possessions, from which any one has, without the lawful judgment of his peers, been disseised or removed, by our father, King Henry, or by our brother, King Richard, and which we retain in our hand (or which are possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things which a plea has been raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from our expedition (or if perchance we desist from the expedition) we will immediately grant full justice therein.

53. "We shall have, moreover, the same respite and in the same manner in rendering justice concerning the disafforestation or retention of those forests which Henry our father and Richard our brother afforested, and concerning the wardship of lands which are of the fief of another (namely, such wardships as we have hitherto had by reason of a fief which anyone held of us by knight's service), and concerning abbeys founded on other fiefs than our own, in which the lord of the fee claims to have right; and when we have returned, or if we desist from our expedition, we will immediately grant full justice to all who complain of such things.

54. "No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.

55. "All fines made with us unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall

be done concerning them according to the decision of the five-and-twenty barons of whom mention is made below in the clause for securing the peace, or according to the judgment of the majority of the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and such other as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him, provided always that is any one or more of the aforesaid five-and-twenty barons are in a similar suit, they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by the rest of the same five-and-twenty for this purpose only, and after having been sworn.

56. "If we have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers; for tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

57. "Further, for all those possessions from which any Welshman has, without the lawful judgment of his peers, been disseised or removed by King Henry our father, or King Richard, our brother, and which we retain in our hand (or which are possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised or an inquest made by our order before we took the cross; but as soon as we return (or if perchance we desist from our expedition), we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the aforesaid regions.

58. "We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

59. "We will do towards Alexander, King of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our other barons of England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly King of Scots; and this shall be according to the judgment of his peers in our court.

60. "Moreover, all the aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

61. "Since, moreover, for God and the amendment of our kingdom, and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five-and-twenty barons of that kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offence be notified to four barons of the aforesaid five-and-twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm), and, laying the transgression before us, petition to have that transgression corrected without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles,

lands, possessions, and in any other way they can until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us. And let whoever in the country desires it, swear to obey the orders of the said five-and-twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to every one who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty-five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect aforesaid. And if any one of the five-and-twenty barons shall have died or departed from the land, or be incapacitatedⁿ in any other manner which would prevent the aforesaid provisions being carried out, those of the said twenty-five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters the execution of which is entrusted to these twenty-five barons, if perchance these twenty-five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty-five had concurred in this; and the said twenty-five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

62. "And all the ill-will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone. Moreover, all trespasses occasioned by the said quarrel from Easter in the sixteenth year of our reign till the

restoration of peace, we have fully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And, on this head, we have caused to be made out to them letters patent of Stephen, archbishop of Canterbury; Henry, archbishop of Dublin, the bishops aforesaid, and master Pandulf, as evidence of this clause of security and of the aforesaid concessions.

63. "Wherefore it is our will, and we firmly enjoin, that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent. Given under our hand—the above named and many others being witnesses—in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign."

Magna Carta has ever been a document to conjure with; it has been solemnly confirmed by the Crown and the Parliament over seventy times; it has been regarded by the English as a shrine; it has been the fruitful source of much inspiration; it has been cited and relied upon, occasions without number, by lawyers at the bar and judges on the bench; and it has been made to have many meanings it did not originally possess.

Modern historians and scholars by a study of the history which preceded it, and an examination of contemporaneous writings, have endeavored to ascertain just what it meant to the Barons who demanded it, and the King who was forced to grant it.

This has resulted in the above translation, which differs in some particulars, from those which have been accepted for centuries.

McKechnie's historical introduction and his comments on each section should be carefully read, but I desire to briefly call your attention to some of the more important features of the instrument from the American standpoint.

The 39th chapter, which is the 29th in the reissue of 1225, has great constitutional significance in this country.

The state constitutions adopted before the Constitution of the United States was framed, followed very closely the words of Magna Carta,

The Constitution of South Carolina of 1778 says:

"That no freeman of this State be taken or imprisoned or disseized of his freehold, liberties or privileges or outlawed, exiled or in any manner destroyed or deprived of his life, liberty or property but the judgment of his peers or by the law of the land."

The Massachusetts Constitution of 1780 is substantially the same, as is that of Maryland of 1776, and of other states. The words "judgment of his peers or the law of the land," were in general use, until the first ten amendments of the Constitution of the United States were adopted, when the words "without due process of law," came into use.

The Constitutions of New York of 1821, 1846 and 1894, adhere to the words "unless by the law of the land or the judgment of his peers."

The right to be governed and judged by the law of the land is secured to all persons, but it is very doubtful, whether the words “nullus liber homo” (no freeman) as used in Magna Carta had any such meaning in 1215.

Coke in the Second Part of his Institutes commenting on Chapter 29, says, that the words “liber homo” extend to villeins for they are free against all men saving against their lords, and they also extend to both sexes, men and women; but Coke has to admit that in other chapters, notably the 20th of the original (the 13th of the reissue) a distinction was made between the freemen and the villeins.

Primarily the freemen were landowners either in fee or for life, that is, freeholders. The villeins were not free as they were subject to their lords, and they needed protection from their masters, not from others. As a consideration for their services, the lords protected, or were supposed to protect their villein tenants from the attacks of others. That was the tie which bound the lords and their tenants together, in the ownership and occupancy of land.

Encomiums have been written without number on the beneficent action of the barons in extending the protection of Magna Carta to all persons in England, but there does not appear to be anything in contemporary history to justify any such praise. The barons were looking out for themselves; they were not laying down any great principle of constitutional government; and they only had regard for their tenants so far as it concerned their own interests as lords.

This is indicated by Chapter 32 of the reissue, which reads:

“No freeman from henceforth shall give or sell any more of his land but so that of the residue of his lands, the lord of the fee may have the service due to him, which belongeth to the fee.”

And by the 34th (24th of the reissue) chapter, which reads :

“The writ which is called praecipe shall not for the future be issued to any one concerning any tenement whereby a freeman may lose his court.”

The barons were desirous of preserving their own feudal courts from the encroachments of the royal courts, and this reactionary provision was insisted upon by them for that purpose.

The barons in the 39th chapter of the charter they forced King John to sign laid down a rule for their own protection, which in the course of the centuries of development to follow was extended to all persons.

It found a place in our first State constitutions, and in the Fifth Amendment of the Federal Constitution as a limitation on the powers of the general government, and in the Fourteenth Amendment it was made a federal limitation on the state governments.

BIBLIOGRAPHY. “The Foundations of England” in 2 vols., “The Angevin Empire” in 1 vol., “The Dawn of the Constitution” in 1 vol., and “Lancaster and York” in 2 vols., by Sir James H. Ramsay, published at different dates from 1892 to 1903, constitute the best general history of England from the earliest times down to the battle of Bosworth and the death of Richard III, in 1485, that has been written. In the concluding chapters of “The Angevin Empire” will be found a detailed account of the events which immediately preceded Magna Carta.

VI.

THE LEGISLATIVE

(Continued)

Statute Confirmationes Chartarum—Statute De Tallagio non Concedendo—14 Edward III., Stat. 2—Petition of Right.

The reign of Henry III. continued for fifty-six years, and although the 12th and 14th chapters of Magna Carta were omitted in all three reissues of that instrument, the barons continued to act as the common council of the kingdom, and their consent was obtained for all extraordinary taxes; and it is noteworthy that on seven or eight different occasions the “aid” requested by the king was refused by the barons.

The government was efficient and in the main satisfactory during the regency of William Marshall, and of his able successor Hubert De Burgh, but when the king surrounded himself with alien advisers trouble began, and the balance of the reign is noted for the struggles and conflicts between the king and the barons, culminating in the Barons' War.

After the battle of Lewes, May 14, 1264, Simon de Montfort governed in the name of the king. He summoned “the great Parliament of 1265,” which met on the 20th of January, and was composed of 120 bishops, abbots, priors and deans; 32 barons, with 2 knights from every shire, and 2 burgesses from every city and borough. It was the first parliament in which the three estates of the kingdom were represented, the church, the baronage and the com-

mons, but it was not a constitutional parliament, because it was simply a parliamentary assembly of the supporters of Montfort.

At the battle of Evesham, August 4, 1265, Montfort was defeated by Prince Edward, the son of the king; Montfort was killed and his body terribly mutilated.

Simon de Montfort made a lasting impression on the constitution of England. By summoning two knights from each shire and two burgesses from each town and borough, he planted the germs of the house of commons.

“The posthumous fame of rebels is generally measured by their success; but to the memory of the great Earl his countrymen were more than just; they awarded to him the honors, not of a statesman, but of a saint and martyr.”

The English usually refer to him as St. Simon.

There were feudal courts in France which were called parliaments, and that name began to be applied to the common councils of the kingdom in the reign of Henry III. These parliaments were at first looked upon as courts, which declared the law but did not legislate.

Thus the document now called the statute of Merton was agreed upon and framed at a council of magnates held at the Priory of Merton in 1236. It is in the nature of a decree by a feudal court settling some disputed points of feudal law. It is recited in the preamble that it was the work of the “*curia domini regis*,” or the court of our lord the King, “before William, archbishop of Canterbury and other of his bishops and suffragans and before the greater part of the earls and barons of England then being assembled.” Its provisions show that it was made by the barons to protect them from the defaults, delinquencies and aggressions of their feudal tenants.

The statute of Marlebridge (Marlborough), of 1267, had for its principal object "the more speedy administration of justice as belongeth to the office of King," and the preamble further recites "that the more discreet men of the realm being called together, as well of the higher as the lower estate, it was provided and agreed and ordained," etc.

Here we see Simon de Montfort's work bearing fruit.

Upon the death of Henry III. his son became King as Edward I., and he was wise enough to adopt the policy of Montfort. The first parliament of his reign was held in January, 1273, and four knights of the shire and four citizens from each borough were called to appear. Edward was then in the east on a crusade, but on his return a "parliament general" was summoned in January, 1275. For the first time the council was called a parliament.

The famous statute of Westminster I. was enacted by the king

"by his council, and by the assent of archbishops, bishops, abbots, priors, earls, barons and all the commonalty of the realm being thither summoned."

This statute is the first great work of the English parliament as a legislative body. It is almost a code, and covers a wide field of legislation.

From the reference to the commonalty in the preamble it is inferred that representatives of the commons were present; there is no evidence to that effect; but to another parliament in October, 1275, knights of the shire were summoned, as they were to later parliaments; but it was not until the model parliament of 1295, that the king for the first time issued writs combining representatives of

clergy, shires and boroughs, in one assembly with the magnates. The barons received personal writs, and the sheriffs were directed to return two knights from each county and two citizens from each city or borough within their shires, with power to bind their constituents.

“By these writs of summons a perfect representation of the three estates was secured, and a parliament constituted on the model of which every subsequent assembly bearing that name was formed.”

In 1297 Edward I. was engaged in a war in France and needed money and forces. During his absence a parliament insisted on a confirmation of Magna Carta, with additional articles in effect restoring to Magna Carta the omitted 12th and 14th chapters. The statute is known as the *Confirmatio Cartarum*. Another instrument is said to have been granted by the king at the same time known as the statute *De Tallagio non concedendo*, but is now regarded by some historians as a popular incorrect version of the real articles; but it did get into the statute books.

STATUTE CONFIRMATIONES CHARTARUM.

Cap. I.

EDWARD, by the grace of God, king of England, lord of Ireland, and duke of Guian, to all those that these present letters shall hear or see, greeting. Know ye that we, to the honour of God and of holy church, and to the profit of our realm, have granted for us and our heirs, that the charter of liberties, and the charter of the forest, which were made by common consent of all the realm, in the time of King Henry, our father, shall be kept in every point without breach. And we will that the same charters shall be sent under our seal, as well as to our justices of the forest, as to others, and to all sheriffs of shires, and to all our other officers, and to all our cities throughout the realm together with our writs, in the which it shall be contained, that they cause the aforesaid charters to be published and to declare to the people that we

have confirmed them in all points; and that our justices, sheriffs, mayors and other ministers, which under us have the laws of our land to guide shall allow the said charters pleaded before them in judgment in all their points, that is to-wit, the great charter as the common law, and the charter of the forest, for the wealth of our realm.

Cap. II.

And we will, that if any judgment be given from henceforth contrary to the points of the charters aforesaid by the justices or by any other of our ministers that hold plea before them against the points of the charters, it shall be undone, and holden for nought.

Cap. III.

And we will, that the same charters shall be sent, under our seal to cathedral churches throughout our realm, there to remain, and shall be read before the people two times by the year.

Cap. IV.

And that all archbishops and bishops shall pronounce the sentence of excommunication against all those that by word, deed or counsel do the contrary to the aforesaid charters, or that in any point break or undo them. And that the said curses be twice a year denounced and published by the prelates aforesaid. And if the same prelates, or any of them, be remiss in the denunciation of the said sentences, the archbishops of Canterbury and York for the time being shall compel and distrain them to the execution of their duties in form aforesaid.

Cap. V.

And for so much as divers people of our realm are in fear, that the aids and tasks which they have given to us beforetime towards our wars and other business, of their own grant and good will (however they were made), might turn to a bondage to them and their heirs, because they might be at another time

found in the rolls, and likewise for the **prises** taken throughout the realm by our ministers: we have granted for us and our heirs, that we shall not draw such aids, tasks nor prizes into a custom, for anything that hath been done heretofore, be it by roll or any other precedent that may be founden.

Cap. VI.

Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors and other folk of holy church, as also to earls, barons, and to all the communalty of the land, that for no business from henceforth we shall take such manner of **aids, tasks, nor prizes**, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prizes due and accustomed.

Cap. VII.

And for so much as the more part of the community of the realm find themselves sore grieved with the malevolent of wools, that is to-wit, a toll of forty shillings for every sack of wool, and have made petition to us to release the same, we at their request have clearly released it, and have granted for us and our heirs that we shall not take such things without their common assent and good will, saving to us and our heirs the custom of wools, skins, and leather, granted before by the communalty aforesaid.

In witness of which things we have caused these our letters to be made patents. Witness Edward our son at London the tenth day of October, the five and twentieth year of our reign.

The statute *Confirmationes Chartarum* was in French and the words "*eides mises ne prises*," are translated into "*aids, tasks and prizes*."

Coke in his *Institutes* says that at that time *auxilia* was a general word including not only aids due by law and tenure and the three special aids, but also aids granted

by parliaments which were subsequently called subsidies, and that as here used the word aids is taken for an aid granted by parliament; and that mises "are properly taken for expenses or charges but here in this act they are taken for tasks, taxes, tallage or takings."

STATUTE DE TALLAGIO NON CONCEDENDO.

Cap. I.

No tallage or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land.

Cap. II.

No officer of ours, or of our heirs, shall take corn, leather, cattle, or any other goods, of any manner of person, without the good will and assent of the party to whom the goods belonged.

Cap. III.

Nothing from henceforth shall be taken of sacks of wool by coulur or occasion of male-tent.

Cap. IV.

We will and grant for us and our heirs, that all clerks and laymen of our land shall have their laws, liberties, and free customs as largely and wholly as they have used to have the same at any time when they had them best; and if any statutes have been made by us or our ancestors, or any customs brought in contrary to them, or any manner of article contained in this present charter, we will and grant, that such manner of statutes and customs shall be void and frustrate for evermore.

Cap. V.

Moreover, we have pardoned Humfrey Bohun earl of Hereford and Essex, constable of England, Roger earl of

Norfolk and Suffolk marshall of England, and other earls, barons, knights, esquires, and namely John de Ferrariis, with all other being of their fellowship, confederacy and bond, and also to all other that hold XX pound land in our realm, whether they hold of us in chief, or of other, that were appointed at a day certain to pass over with us into Flanders, the rancour and evil will born against us; and all other offences that they have done against us, unto the making of this present charter.

And for the more assurance of this thing, we will and grant, that all archbishops and bishops forever shall read this present charter in their cathedral churches twice in the year, and upon the reading thereof in every of their parish churches, shall openly denounce accursed all those that willingly do procure to be done anything contrary to the tenor, force and affect of this present charter in any point and article.

In witness of which thing we have set our seal to this present charter, together with the seals of the archbishops, bishops, etc., which voluntarily have sworn that, as much as in them is, they shall observe the tenor of this present charter in all causes and articles, and shall extend their faithful aid to the keeping thereof, etc.

Coke says:

“*Tallaguim* or *tailaguim* cometh of the French word *tailer*, to share or cut out a part, and metaphorically is taken when the king or any other hath a share or part of the value of a man's goods or chattels, or a share or part of the annual revenue of his lands, or puts any charge or burthen upon another; so as *tallaguim* is a general word and doth include all subsidies, taxes, tenths, fifteens, impositions or other burthens or charge put or set upon any man, and so is expounded in our books, here it is restrained to tallages set or levied by the king or his heirs.”

The main difference between these two instruments is,

that the one does not expressly mention the tax called tallage, tallaguim, and the other does.

Everybody had to pay taxes in England, and cities and boroughs and all those free tenants who did not hold their land by knight's service were subjected to the payment of tallage to the king, on special occasions such as a foreign expedition by the king.

The barons in their articles demanding the Great Charter of King John had requested that tallages be included with scutages and aids in the dues that were not to be imposed without the consent of the common council of the realm; but there were no representatives of the towns and boroughs and free tenants at Runnymede, except the men in the ranks, and on this feature of their articles the barons yielded.

As King Edward was anxious to secure the support of the towns and boroughs it is probable that the statute *De Tallagio* was granted to please them, but with no intention on the part of the king to comply with it on his return to England.

The historians have not been able to give us any very accurate or satisfactory explanation of the fact that the confirmation of the charters by Edward I. appears in two separate instruments. In the *Statutes of the Realm*, the *Statute de Tallagio non Concedendo* is attributed to the 34th year of the realm of Edward I. (1306), but this has been proved to be erroneous, and the true date is the same or about the same as that of the *Statute Confirmationes Chartarum* (1297).

Another conspicuous thing about these two statutes is that while the one does not mention the tax known as

tallage, the other has no saving clause reserving to the king the "ancient aids, tasks and prises due and accustomed." If we are to have any regard for the subsequent conduct of Edward I. in the exercise of the right reserved by the first of these statutes, it is difficult to reach the conclusion that he intended by the second statute to surrender that right, although that seems to be the plain meaning of the act, when considered by itself.

The most probable explanation is that the Statute Confirmacionis Chartarum was assented to by Edward I. in good faith with the intention of living up to the limitations placed by it upon the royal power, and that the *Statute de Tallagio non Concedendo* was sealed by him in response to an urgent demand on the part of the barons, and to temporarily satisfy them, but with no intention on his part of observing it, as far as it took away his prerogative of levying tallage on the demesne lands of the crown, and on the cities, towns and boroughs.

The Petition of Right (1628) mentions the Statute de Tallagio non Concedendo as a statute of the realm, and in 1637 the judges held it to be a statute, but it was not until the 14th Edward III. (1340) that a statute, about which no question could be made, was enacted prohibiting tallages except by consent of parliament.

14 EDWARD III. Stat. 2.

(1340)

Edward by the Grace of God, etc., to all them, etc.,
GREETING.

Know ye, that whereas the Prelates, Earls, Barons, and Commons of our Realm of England, in our present Parliament holden at Westminster the Wednesday next after the Sunday of middle Lent, the fourteenth year of our reign of England,

and the first of France, have granted to us of their good Grace and good will, in Aid of the speed of our great business which we have to do, as well on this side the Sea as beyond, the Ninth Sheaf, the Ninth Fleece, and the Ninth Lamb, to be taken by two years next coming after the making of the same, and the Cities and the Burgesses of Boroughs the very Ninth part of all their goods; and the foreign merchants, and other, which live not of Gain, nor of store of sheep, the fifteenth of their goods lawfully to the Value: (2) We willing to provide for the Indemnity of the said Prelates, Earls, Barons, and others of the Commonalty, and also of Citizens, Burgesses and Merchants aforesaid, will and grant for us and our Heirs, to the same Prelates, Earls, Barons, and Commons, Citizens, Burgesses and Merchants, that the same Grant which is so chargeable, shall not another Time be had in Example nor fall to their Prejudice in Time to come, nor that they be from thenceforth charged nor grieved to pay any aid, or to **sustain Charge**, if it be not by the Common Assent of the Prelates, Earls, Barons, and other great Men, and Commons of our said Realm of England, and that in the Parliament; (3) and that all the profits arising of the said Aid, and of Wards and Marriages, Customs and Escheats, and other Profits rising of the said Realm of England, shall be put and spent upon the Maintenance and the Safeguard of our said Realm of England, and of our Wars in Scotland, France and Gascoin, and in no places elsewhere during the said wars.

Cap. II.

Item, Where it is contained in the Great Charter, That all Merchants shall have safe and sure conduct to go out of our Realm of England and to come and abide, and go through the Realm of England, as well by Water as by Land, and to buy and sell paying their rights and Customs, but in the Time of War; (2) we at the request of the Prelates, Earls, Barons, and Commons, will and grant for us and our heirs and Successors, That all Merchants, Denizens and Foreigners, (except those which be of our Enmity) may without Let safely come

into the said Realm of England with their goods and Merchandise and safely tarry, and safely return, paying the Customs, Subsidies and other Profits reasonably thereof due; (3) so always that the franchises and free Customs reasonably granted by us and our ancestors to the City of London, and other cities, Boroughs, and good towns of our realm of England, be to them saved.

The foregoing statute simply removed whatever doubt may have existed as to the validity and binding force of the former statute.

The reign of Edward I. is therefore entitled to the distinction of having established the two great constitutional principles that the people, as the commonalty or third estate, were entitled to representation in the parliament which became the general taxative and legislative branch of the government of England and that no taxes could be levied without its consent. Having obtained control of taxation, the power of the parliament to withhold a grant of taxes unless accompanied by a redress of grievances enabled it to force the king to give his assent to legislation. The above statute is an example of that kind, and the parliamentary history of England shows that in this way, the parliament become supreme, until finally the power of the king to refuse his assent, that is, to veto a bill passed by the two houses, became obsolete, and now for two centuries has not been exercised by any English King or Queen.

We generally speak of the power of taxation as a part of the legislative power, but historically the taxative power was the mother of the legislative power; in fact, it is greater than the legislative power, and it would historically be more correct to say that the power of taxation includes and carries with it, the power to legislate.

After the third and final re-issue of Magna Carta it was confirmed in almost every reign. Coke in his second Institute gives a list of 31 statutes of confirmation which were enacted before the seventeenth century. Two of them we have already considered. Two others are worthy of notice by American students.

The confirmatory statute of 28 Edward III. (1354) makes the first use of the words "due process of law." Chap. 3 reads:

"That no man, of what estate or condition he be, shall be put out of land, or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law."

The statute 42 Edward III. was an attempt to bind future parliaments not to violate Magna Carta. Chap. 1 reads:

"It is assented and accorded that the Great Charter and the Charter of the Forest be holden and kept in all points; and if any statute be made to the contrary that shall be holden for none."

The doctrine that a statute contrary to the fundamental law is unconstitutional and void never obtained recognition in England, but in our American constitutions it is affirmatively and positively expressed.

From the reign of Edward I., which ended in 1307, to that of Charles I., which began in 1625, is a long jump of over three hundred years, yet, there is no other than the two we have just stated, strong constitutional document in the whole period.

We find at the close of the reign of Edward I. five different elements or interests struggling with each other for the mastery of England:

(1) The Crown; (2) The Church with its spiritual princes; (3) The Baronage with its temporal lords; (4) The Knights of the Shires representing rural England, and (5) The representatives of the cities and boroughs.

The Church at first acted independently of the two other so-called estates of the realm; but finally the spiritual and temporal lords became the House of Lords.

The Knights of the shire, as the lesser barons, were at first inclined to act with the greater barons, but they soon found that the interests which they represented were very closely allied to those of the cities and boroughs, and they united with the representatives of the latter, and together they became the House of Commons.

Parliament showed its power in the deposition of Edward II. and Richard II. and on various other occasions; but at other times it sank into insignificance, notably during the reign of Henry VIII.

It was not until the Stuart kings of England, under the claim of Divine Right, undertook to rule by the exercise of the royal prerogatives, that the final struggle for the establishment of the principles of constitutional government first asserted in the Great Charter, took place; and that struggle covered all of the seventeenth century.

The great popular revolt against the Stuarts first found formal expression in the Parliament of 1628, when the King was forced by the House of Commons to give his assent to the famous Petition of Right, in which is to be found all of the great constitutional principles expressed in prior statutes.

PETITION OF RIGHT.

Car. I. c. i.

(1628)

The Petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament, assembled, concerning divers Rights and Liberties of the Subjects, with the King's Majesty's royal answer thereunto in full Parliament.

To the King's Most Excellent Majesty.

Humbly show unto our Sovereign Lord the King, the Lords Spiritual and Temporal and Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the time of the reign of King Edward I, commonly called **Statutum de Tallagia non Concendendo**, that no tallage or aid shall be laid or levied by the king or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm; and by authority of parliament holden in the five-and-twentieth year of the reign of King Edward III., it is declared and enacted, that from thenceforth no person shall be compelled to make any loans to the king against his will, because such loans were against reason and the franchise of the land; and by other laws of this realm it is provided that none should be charged by any charge or imposition called a benevolence, nor by such like charge; by which statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in parliament.

II. Yet nevertheless of late divers commissions directed to sundry commissioners in several counties, with instructions, have issued; by means whereof your people have been in

divers places assembled, and required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, have had an oath administered unto them not warrantable by the law or statutes of this realm, and have been constrained to become bound and make appearance and give utterance before your Privy Council and in other places, and other of them have been therefore imprisoned, confined and sundry other ways molested and disquieted; and divers other charges have been paid and levied upon your people in several counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by command or direction from your majesty, or your Privy Council, against the laws and free customs of the realm.

III. And whereas, also by the statute called "The Great Charter of the liberties of England" it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law.

V. Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the cause of their detainer, no cause was certified but that they were detained by your Majesty's special command, signified by the lords of your privy council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

VI. And whereas, of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of their realm, and to the great grievance and vexation of the people.

VII. And whereas, also by authority of parliament, in the five-and-twentieth year of the reign of King Edward III, it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament; and whereas, no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless, of late times divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed' to the trial and condemnation of such offenders, and then to cause to be executed and put to death according to the law martial.

VIII. By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed.

IX. And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishments due to them by the laws and statutes of this your realm, by reason that

divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annuled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all of your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom, *Qua quidem petitione lecta et*

plenispiritellecta per dictum dominum regem taliter est responsum in pleno parlamento, viz. Soit droit fait come est desire. (Statutes of the Realm, v. 24, 25.)

At present we are only concerned with those parts of Petition of Right relating to the power of taxation.

The kings of England were always short of money, and when the taxes voted by parliament were not sufficient to meet the royal necessities the kings would borrow of the Jews, and of foreign merchants doing business in England, and in turn would favor them, and release them as far as he could from the disabilities to which they were subjected.

At home wealthy men and communities, such as towns and monasteries, would loan money to the king. It was not always easy to raise money in this way and recourse would then be had to compulsion. These forced loans were falsely called benevolences. As Prof. Medley says:

“The advantage of this method was that it caused no widespread discontent in the country. The difference between a forced loan and a benevolence or free gift is not easy to grasp; for, a loan taken at the king’s pleasure might also be repaid in his own good time, and with a complaisant Parliament to back him the distinction entirely disappeared.”

This explanation will enable you to understand the references to loans and benevolences in the 1st, 2d and 10th paragraphs of the Petition of Right, and you will notice that it is specifically stated that no one should

“be compelled to contribute to any tax, tallage, aid or other like charge not set by common consent in parliament.”

Bibliography: "History of England from the Accession of James I, to the Outbreak of the Civil War" (1603-1642), by Samuel R. Gardiner, in ten small volumes, published in 1900 by Longmans Green and Co., of London and New York, is a most valuable work, which gives the best account of the events which led to the Petition of Right, and to the Ship-Money case, and the Long Parliament.

"The Constitutional History of England from the Accession of Henry VII. to the death of George II," by Henry Hallam, in three volumes, written and revised in 1827, 1832 and 1846, and published in 1877 by W. J. Widdleton, of New York, is a standard work which covers the same period, and also the period with which we will be concerned in my next lecture.

VII.

THE LEGISLATIVE.

(Continued)

The Ship-Money case, 1 Hargraves State Trials 508—How. State Trials 826—Speech of the Lord Keeper showing the case submitted by the king to the judges—The judge's answer.—Argument of Oliver St. John for Mr. Hampden—Argument of Solicitor General for the King—Argument of Mr. Holborne for Mr. Hampden—Argument of Attorney General for the King.

The reason why the Petition of Right did not settle the constitutional policy of England for all time is to be found in the fact that Charles I. did not give his assent to the petition in good faith. The judges unknown to the Commons gave the king to understand that as it would devolve upon them to construe and apply the act, he had nothing to fear from the courts, and he therefore, started on that career of despotism which brought him in twenty years to the executioner's block.

Dissolving parliament in 1629 he did not summon another until 1640 and during this parliamentary interregnum of eleven years, he ruled England as if the Petition of Right had not been enacted into law. The wonder now is that the English people submitted as long as they did, but it was due to the religious fanaticism of the times, and their natural love of law and order, and their obedience to authority. During these eleven years two things happened of supreme importance to the constitutional law of England and America. (1) The persecution of the Puritans and the Catholics forced them to

emigrate in large numbers to America, where they founded the Puritan colonies of New England and the Catholic colony of Maryland, and firmly planted in American soil the seeds of constitutional liberty. (2) There arose in England for adjudication the most important constitutional question that has ever been passed upon by a court of justice, viz: Whether the King as the executive head of the nation had power to levy taxes without the consent of parliament.

THE SHIP-MONEY CASE.

A full report of this case will be found in 1 *Hargraves State Trials*, 506. The ports of England were subject to unexpected attacks by pirates and by the ships of war of other nations, and in emergencies of this kind the king would without consent of Parliament call upon the inhabitants of the port-towns and of the counties in which they were situated, for ships and men and supplies and money, with which to resist an attack; but as the power was sparingly used, and only in cases of actual emergency it was not regarded as obnoxious, or at least it met with no serious opposition.

Seizing upon this practice as a precedent Charles I. under the advice of William Noy, his Attorney General, Thomas Lord Coventry, Keeper of the Great Seal, and Henry Montague, Earl of Manchester and Keeper of the Privy Seal, levied taxes without summoning a Parliament, upon the whole kingdom, for the purpose of equipping a navy.

On June 17, 1635, the Lord Keeper in a speech to the judges in the Star Chamber as they were about to go to their several circuits, called their attention, by com-

mand of His Majesty, to a levy which had already been made upon the maritime places and announced his purpose of making a levy on the whole kingdom “for the purpose of a greater fleet the next year.”

February 14, 1636, the Lord Keeper made another speech to the judges in which he made public an extra judicial or private opinion the King had obtained from them sustaining his power to levy a ship money tax.

SPEECH OF THE LORD KEEPER.

“My Lords, I have but one particular more, and that is of great importance; whereof by special direction and command from his Majesty, I am to speak unto you at this time. All of you are the witnesses of his Majesty’s proceedings, tho’ the candour and clearness of his own heart exceedth your testimony, and your testimony is not only fit to be declared in this place, but in all the places of this realm.

“His Majesty hath now the third time sent forth writs to require the aid of his subjects for the guarding of the dominion of the sea, and safety of the kingdom. This his Majesty did upon great deliberation and advice, and upon important and weighty reasons.

“In the first year when the writs were directed to the Ports and maritime places, they received little or no opposition; but in the second year when they went generally thro’ out the kingdom (tho’ by some well obeyed) have been refused by some, not only in some inland counties, but in some of the maritime places; and actions have been brought against some that have been employed in the execution of these writs. I suppose that no man will expect that *Arcana Regni*, the private reasons of a prince, should either upon this or other occasions be made publick, but so many reasons as were fit to be opened, were formerly declared by me in this place to you the judges of this realm.

“The first was, that the whole kingdom is concerned in point of safety; admitting there were no other counsel or attempt against us, but only to interrupt us in the dominion of the seas, our most secure and safe defence, better either than castles or forts; which if it be commanded by others, it lays us open to much peril and danger.

“Secondly, the whole kingdom is concerned in point of honour for it is one of the most ancient and honourable rights of the crown of England, even the dominion of the sea. And all records do show, how the kings and people of England have ever been careful that this honour should never perish; and certainly the whole kingdom is concerned in point of trade and profit; for the traffic does not only enrich the Maritime ports but the inland towns; and if trading fail, the inland places will find it in the fall of the prices of wool, lead and other staple commodities. This experience sheweth daily, when upon every stop of the Vent of the cloth, there come such outcries by the weaver, the fuller, the spinner, and wool-growers themselves; and the authority of the law sheweth the same 43 in the Book of Assize, which your Lordships know better than I, it appears that certain men went into the country and cast out a fame, that for that year no wool should be transported beyond the seas; presently upon this the price of wool fell and those men were called in question, and were adjudged in a fine for it. Now if a rumour did so much abate the trade in the heart of the kingdom, what would the loss of the dominion of the seas do, which exposeth us, and all our trade to the mercy of our neighbours? Therefore since the whole kingdom is concerned in point of Honour, safety and profit, what reason is there but that all should contribute to the maintenance of it? This, or to the like effect, I did formerly declare to you the Judges by his Majesty’s command; and his Majesty received satisfaction, in that you made a full declaration thereto in your circuits; and this I may say, for the most part the subjects have shewed themselves most dutiful and obedient in this service of his Majesty; and this year the sum imposed upon the county of York, being twelve thousand pounds, is brought in already by the sheriff, and so is most

part of Lancashire, and other shires; but when his Majesty heard of some refusals, tho' he had cause to be sensible of it, yet he was far from being transported' with passion, but thought good to resort to the advice of you his Judges, who are sworn to give him faithful and true counsel in that which pertaineth to the law; and that his Majesty, as well for the direction of his own counts, as for the satisfaction of his subjects, required you to deliver your opinions herein, to which you returned an answer under your hands. And because the command which you received from the king, is expressly in a princely letter, under his own signature, I shall not take upon me to repeat it, you shall hear it read.

"Which being delivered by my Lord-Keeper to one of the Clerks of the court, was read in *hac verba*.

CAROLUS Rex.

Trusty and well beloved, we greet you. Taking into our princely consideration, that the honour and safety of this our realm of England', the preservation whereof is only intrusted to our care was, and is now more nearly concerned than in former times as well as by divers counsels and attempts to take from us the dominion of the seas, of which we are sole lord and rightful owner; the loss whereof would be of greatest danger and peril to this kingdom, and other our dominions: We, for avoiding these and the like dangers, well weighing with ourselves, that where the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, there the charge and the defence ought to be borne by all of the realm in general; did, for prevention of so public a mischief, resolve with ourselves to have a royal navy provided, that might be of force and power with Almighty God's blessing and assistance, to protect and' defend this our realm and our subjects, from all such perils and dangers; and for that purpose we issued forth writs under our great seal of England, and directed to all our sheriffs of all our several counties of England and' Wales, commanding thereby all our said subjects, in every city, town and village, to provide for a

number of ships, well furnished, as might serve for this our royal purpose; and which might be done with the greatest equality that could be. In performance whereof, tho' generally throughout all the counties of this our realm, we have found in our subjects great cheerfulness and alacrity which we graciously interpret as a testimony, as well of their dutiful affections unto us, and to our service, as the respect they have to the public, which well becometh every good subject, nevertheless finding that some few, haply out of ignorance with the laws and customs of this our realm are, or out of a desire to be eased and freed in their particular, (how general soever the charge ought to be) have yet paid and contributed the several rates and assessments that were set upon them, and for seeing, in our princely wisdom, that from hence divers suits and actions are not unlikely to be commenced and prosecuted in our several courts at Westminster: We, desirous to avoid such inconveniences, and out of our princely love and affection to all our subjects, being willing to prevent such errors as any of our loving subjects may happen to run into, have thought fit in a case of this nature to advise with our judges, who we doubt not are all well studied and informed in the right by our sovereignty. And because the trials in our several courts, by the formality in pleading, will require a long protraction, we have thought it expedient, by this our letter directed to you all, to require your judgments in the case, as it is set down in the enclosed paper, which will not only gain time, but also be of more authority to over-rule any prejudicate opinions of others in the point.

“Given under our Signet at our court at White-hall, the second day of February in the twelfth year of our Reign, 1636.”

This being thus read, the Lord-Keeper commanded the case inclosed to be read, being as followeth:

CAROLUS Rex.

When the good and safety of the kingdom in general is concerned and the whole kingdom is in danger; whether may

not the king by writ under the great seal of England command all the subjects of this kingdom, at their charge, to provide and furnish such number of ships, with men, victuals and munition and for such time as he shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and by law compel the doing thereof, in case of refusal or refractoriness? And whether in such a case, is not a king the sole judge, both of the danger, and when and how the same is to be prevented and avoided?"

THE JUDGES' ANSWER

"May it please your Most Excellent Majesty.

"We have, according to your Majesty's command, every man by himself, and all of us together, taken into consideration, the case and question, signed by your Majesty, and inclosed in your royal letter:

"And we are of opinion, that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your Majesty may by writ, under the great seal of England, command all the subjects of this your kingdom, at their charge, to provide and furnish such number of ships, with men, munition and victuals and for such time as your Majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril: And that by law your Majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion, that in such case, your Majesty is the sole judge, both of the danger and when and how the same is to be prevented and avoided.

Jo. Bramston
Jo. Finch
Hump. Davenport
Jo. Denham
Rich Hutton
W. Jones

Geo. Cooke
Tho. Trevor
Geo. Vernon
Fra. Crawley
Rob. Berkley
Fra. Weston

The said case, with the Judges opinions thereunto (formerly in private delivered to his Majesty) being thus publicly made known by my Lord-Keeper, who, withal, caused their several names to be read as they were in order subscribed (all the judges being present save only Judge Croke); the Lord-Keeper spake as followeth.

“My Lords:

“This being the uniform resolution of all the judges of England with one voice, and set under their own hands; I say, this being so resolved, as they do hereby express upon every man’s particular studying the case, and upon a general conference amongst themselves, it is of very great authority: for the very lives and lands of the king’s subjects are to be determined by these reverend judges; much more a charge of this nature, which God knows cannot be burdensome to any, but is of singular use and consequence, and for the safety of the whole kingdom. The command from his Majesty is, that I should publish this your opinion in this place, and give order that it should be entered in this court, in the High Court of Chancery, and in the Courts of King’s Bench, Common Pleas, and Exchequer; for this is a thing not fit to be kept in a corner: And his further command is, that you the judges of England, thro’ all parts of the kingdom, that all men may take notice thereof, and that those subjects which have been in an error, may inform themselves, or be reformed. You have great cause to declare it with joy and you can hardly do it with honour enough to the king, that in so high a point of his sovereignty, he has been pleased to defend and to communicate with you his judges; which sheweth, that justice and sovereignty in his Majesty do kiss each other. His further pleasure is, that you let all know it is not his purpose by this resolution to stop or check, the actions or suits which any have brought, or shall bring, concerning this; for it is his Majesty’s command, that all such as proceed in any action about the same, have equal and meet justice, and that they be suffered to proceed in course of law, so as you call the king’s

learned counsel unto their proceedings, that they may not be surprised.

“Now, my Lord's, I have little more to say, but this I am sure of that if any contrary opinion shall yet remain amongst men, it must proceed from those that are sons of the law (*Faelices assent artes*), and you the judges of the realm have been accounted the Fathers of the law in good faith, it will ill become the son to dispute against the father. Having thus delivered unto you, what I received in command from his Majesty, as his Majesty doth, so do I, leave it to your judgments.”

CHARLES I. and his advisers assumed that the unanimous opinion of the judges of the three great courts, of the kingdom, although privately obtained by him, settled the question of the legality of ship-writs beyond any further controversy, and they proceeded to enforce payment of the tax. The nation acquiesced, but a few resolute souls resisted, and insisted upon litigating the question in open court, among them John Hampden, a country gentleman, residing in Buckinghamshire. The King, confident that the judges would adhere to their extra-judicial opinion caused his Attorney General to sue out a writ of *scire facias* in the Court of Exchequer requiring Hampden to show cause why he should not pay the tax of twenty shillings which had been assessed against his property. All of the twelve judges sat at the hearing in the Exchequer chamber and the case was argued by counsel for twelve days. Oliver St. John and Robert Holborne were the counsel retained by Hampden, and John Banks, Attorney General, and Edward Littleton, Solicitor General, represented the King.

The counsel for Hampden labored under great embarrassment because the judges had already ruled against

them, and if they were too outspoken in expressing their views, they might receive the violent censure of the Court.

Mr. St. John opening for Mr. Hampden wisely conceded a part of the case of the King. He did not attempt to draw any distinction between the levy of ship money in the inland counties and its levy in the maritime counties, although the historical precedents relied upon by the counsel for the King fully justified such a distinction; nor did he deny that the King was the sole judge of the existence of danger.

In making his preliminary statement of the case, among other things, he said:

“My Lords, not to burn day light longer, it must needs be granted that in this business of defence, the Supreme Potestas is inherent in his Majesty, as part of his Crown and kingly dignity. So that as the care and provision of the law of England extends, in the first place, to foreign defence; and secondly, lays the burden upon all and for aught I have to say against it, it maketh the quantity of each man’s estate the rule whereby this burden is to be equally proportioned upon each person: So likewise hath it, in the third place, made his Majesty sole judge of dangers from foreigners, and when and how the same are to be prevented; and to come nearer, hath given power by writ under the great seal of England, to command the inhabitants of each county to provide shipping for the defence of the kingdom, and may by law compel the doing thereof.

“So, my Lords, as I will conceive, the question will not be *de persona* in which the **Supreme Potestas** of giving the authorities or powers to the sheriff; but the question is only **de Modo**, by what medium or method this Supreme Power, which is in his Majesty, doth insue and let out itself into this particular and whether or no in this case such of them have

been used, as have rightly accomodated and apply'd this power unto this Writ in the intended way of defence:

“For the law of England, for the applying of that supreme power which it hath settled in his Majesty to the particular causes and occasions hath set down a method and known rules, which are necessarily to be observed.”

St. John then went on to state his position to the effect that the power which he conceded was vested in the King, could only be exercised by the *King in Parliament*, that is by obtaining a parliamentary grant of supplies whereby the Lords spiritual and temporal and the Commons as the common council of the realm, would give their consent to taxation.

Historians of this period of English history have expressed the opinion that Mr. St. John made too great a concession in his presentation of the question before the court; but they overlook the fact, that as counsel for Hampden he was induty bound to use his best efforts to convince the judges that their extra-judicial opinion was erroneous. He knew that they were hopelessly committed to the doctrine, which had prevailed from the Norman Conquest, that the sovereign power of the kingdom was vested in the King, and as a discreet and practical lawyer and advocate, he evidently was of the opinion that it was better to treat the functions of parliament in giving its consent to taxation or legislation as a limitation on the power of the king, rather than an assumption of sovereign power by parliament itself with the approval of the king as a check thereon.

The truth is parliamentary sovereignty was unknown in English law until after the revolution of 1688 and the accession of William and Mary. Since then par-

liament has been supreme, and the royal approval of an act of parliament a matter of form only.

St. John exercised good judgment in making the theoretical concession he did as it was the most adroit and effective way of making an impression on the judges. Any other course would have been suicidal. His alleged concession made his argument that under the laws of England the King could only exercise the taxing power with the consent of parliament, the more effective and convincing; it cleared the way for a proper consideration of the exact question to be determined by the court, viz: Whether the consent of the lords spiritual and temporal and the commons, in parliament assembled, was not necessary to the validity of the ship-money tax.

Experience in arguing cases before a bench of judges soon teaches a member of the legal profession that "when a case is clearly and accurately stated to the court it is more than half argued." Mr. St. John evidently had a due appreciation of the truth of this saying, for, before passing to his main argument, he took up in their order, the various sources of revenue, with which the Kings of England were endowed by law, independently of special grants from time to time by parliament; and he showed very conclusively, that primarily, the principal portion of the ordinary revenues of the Crown, were for the defence of the kingdom. He began with the tenures of land under which the most of the kingdom was held either mediately or immediately of the Crown on condition that the holders should render military service in the wars. He mentioned tenure by knights service by which each holder of a knights fee was required to serve forty days; grand serjeantry, obligating the holder to carry the banner of the king or to perform other and special service; petty serjeantry for finding of armour of all sorts; corn-

age to give warning of the enemies coming into the kingdom; and castle guard to defend the castles when the enemy enters the kingdom. The cinque ports and the counties palatine enjoyed special privileges on condition that they defended themselves, and the realm, from attacks from the sea or from the Scots and Welsh, and certain other towns, some of them not maritime, were under a similar obligation. Passing from services in kind, to tenures for supplying the king with money, St. John called attention to the power of the lord of land over the persons and goods of his villeins, and of the king over tenants of the ancient demesne, and to rents due from boroughs which held by tenure in burgage; and finally he concluded this part of his argument, by a review of the grants of custom duties known as tonnage and poundage, which had at first been made on extraordinary occasions for the guarding of the sea, but for many reigns had been granted to each king for life for the very purpose that he might have in readiness a stock of money to withstand an invasion.

Having thus carefully stated the case, St. John insisted that if the ordinary resources and income of the Crown proved inadequate or insufficient to meet any emergency, the law had provided that the King could procure new or additional supplies by parliamentary grant.

In an elaborate review of the parliamentary history of England he demonstrated that the main object and purpose of summoning the Lords and Commons to a parliament was to obtain grants for extraordinary defenses; and that the law had provided this parliamentary way for supplying of the King's wants, and had put the power of using it into His Majesty's own hands, for he could call a parliament when and so often as he pleased.

Mr. St. John made use of a large amount of antiquarian lore, but placed his principal reliance on Magna Carta, the Statute Confirmationes Chartarum, the Statute De Tallagio Non Concedendo and the Petition of Right. He contended that ship-money was covered by the word *auxilium* in the constitutional article in the statute of *Running Mead*; that the clause in the Statute Confirmationes Chartarum saving to the King the ancient aids and prises due and accustomed, was satisfied with the three feudal aids, excepted, in *Running Mead*, and the prising of arms and purveyance, but to do away with any doubt or scruples on that point, the Statute De Tallagio was signed by Edward I. after he had approved of the Statute Confirmationes; and that all three of the statutes constitute *Magna Carta*, as subsequently and so often confirmed.

St. John quoted from the Commission of the Loan, 2 Charles I., these words:

“The great and mighty preparations both by sea and land did daily threaten the kingdom; that the safety and substance of the king and people, and the common cause of Christendom, were in apparent danger of suffering irreparably; that the king’s treasure is exhaust and the coffers empty; that the business of supply cannot endure so long delay as the calling of a Parliament, and enquiring into all means just in cases of such unavoidable danger; the king now resolved to borrow of the subject to enable his Majesty for their safeties, and promiseth repayment.”

He then reminded the judges that in the Parliament of 3 Charles I. which secured the king’s approval of the Petition of Right the legality of this commission was questioned, and upon debate, adjudged by both Houses to be void in law, and this view of the subject was included

in the Petition of Right, and it was not denied by His Majesty.

In conclusion, St. John argued that so many of the kings and queens of England had failed to claim any such extraordinary power over their general consent that without assent in parliament they could not have laid the like sess or tax upon their subjects as was laid upon his client.

Mr. St. John's argument was listened to by a crowded audience which drank in every word he said, and when he closed he found himself one of the most famous Englishmen of his day.

The Solicitor General in reply to St. John made an able argument in support of the power of the king to issue ship writs requiring the aid of his subjects to preserve the kingdom and the people in case of an actual invasion or threatened invasion, and he undertook to defend the ship writ before the court, by showing what ought to be done and could be done when the whole realm was in danger of destruction by an enemy. He wholly ignored the fact that the ship writ issued to the sheriff of Buckinghamshire was dated Aug. 4, 1635, and did not require the ship that was to be furnished and equipped by that county to be at the port of Portsmouth until the 1st day of March following, and that at the time the writ was issued and from thence until the case was being argued in 1637, England was at peace with all the world and there was ample opportunity to summon a parliament; and he also ignored the still more important fact that there had been four annual issues of such writs and the aid required was not an emergency tax, but had become a regular annual assessment. Undoubtedly Charles I. and his advisers were right in insisting that England

needed a better navy to protect her from her enemies, but the danger was a general and permanent one, and if the king could lay a tax for the defense of the sea there were no reason why he could not do the same thing to maintain an army for the defense of the land; and if so, there would never be any occasion to summon another parliament, and already none had been called for eight years. These general facts were what gave the case its importance and significance, but the learned solicitor general realized that if the judges could be induced as foreshadowed by their extra-judicial opinion to dispose of the ship writ before the court, on the theory that it was issued to meet an unexpected exigency, he would have no difficulty in obtaining a judgment in favor of the king.

The Solicitor General in answer to St. John's position that the king could in parliament levy a ship-money tax for the defense of the kingdom, stated his own position as follows:

"The only difference is *de modo*, whether the right media be observed by the king? And whilst we are disputing whether he may do it, I am told he may do it in parliament; true, he that may do it everywhere, may do it in Parliament. And I shall be sorry to hear there shall be no salvation for the people but in Parliament."

Realizing the force of St. John's argument, and admitting that it had been presented "with a great deal of care" and with "advantage and policy," the Solicitor General made this declaration:

"I shall shew it from the foundation of the Kingdom, to that which they call the Norman Conquest; from the Norman Conquest to the time of Magna Charta, made 9 Hen. III. from Magna Charta to the **Statute De Tallagio non concedendo**, made 25 Ed. I. from the Statute **De Tallagio non concedendo** to the first granting of Tonnage and Poundage; from

Tonnage and Poundage to this very day, and that the Petition of Right doth no way concern the dispute. I shall confute all precedents, objections, reasons, inconveniences, authorities or records, of which a great number were cited, that there shall not be a syllable left; and in that, First, I will either shew that the record is mistaken, or impertinent and not to the question: Or, Secondly, Those that are pertinent, I will either agree them, or take the force of them away that none of them shall be able to stand in the way of the King in this way of defence."

And further on he said:

"I see with what policy Mr. St. John went, and what multiplicity of records he cited, and opened them with as much skill as ever I knew any man; but I desire to go in the path of naked truth. I shall make it appear to all the world, that the king hath done nothing but what his predecessors have done; and that there is not more testimony to prove Littleton's first case, that the heir at law shall have his patrimony, than there is to prove this the King's right."

St. John had searched the old records for limitations on the power and prerogatives of the crown, and the Solicitor General with equal industry and care went into the old records in search of precedents showing that the kings of England had always exercised the like or a similar power. He had no difficulty in producing an overwhelming amount of this kind of evidence, for the truth is that as a general rule the English people had acquiesced in the exercise, on one plausible excuse or another, of authority by the recognized head of the nation, and it was only on sporadic and exceptional occasions that they asserted and maintained the right of representative self-government. Constitutional limitations of the power of the Crown were the exception and not the rule, and it was only by a very slow and gradual process that the great principles

of the constitution of England became fixed and permanent.

We are, therefore, more interested, in knowing the answer of the learned Solicitor General to the express limitations contained in Magna Carta as confirmed by the statutes *Confirmationes Chartarum* and *De Tallagio Non Concedendo*, and in the Petition of Right, than in the precedents showing violations of these great statutes. His answer to Magna Carta as finally confirmed was a simple one. He pointed out that Edward I. was engaged in offensive wars in France and against the Scots and Welsh and that the confirmatory statutes were approved by the king to obtain supplies to enable him to carry on these wars, and that therefore, they applied to offensive or foreign war only, and had no bearing upon the prerogative of the king to call upon his subjects to aid at home in the defense of the realm. He further insisted that ship-money was an ancient aid which was within the saving clause in the statute *Confirmationes Chartarum*, and that the Statute *de Tallagio* was a mere abbreviation of the other statute and did not eliminate the saving clause, and it was not in force and authority in the case as there was no record of it except that of Walsingham, a monk of St. Albans who was a mere chronicler, and not a true historian. His answer to the Petition of Right showed the weakness of his case more than any other part of his argument; it was in effect that the king had not really given his assent to the petition, and what he did do was on the assurance of the judges that as interpreters of the law they could protect his prerogatives. He said:

“At the end of the Petition of Right, neither Lords nor Commons, jointly nor severally, can make a new law, without his consent; and that your Lordships, and none but you, are interpreters of the law, wise King James did declare.”

Mr. Holborne followed the Solicitor General in an argument in behalf of Mr. Hampden. He first sought to have the court determine the case in favor of his client on the point that the ship writ issued to the Sheriff of Buckinghamshire did not show a present and immediate danger that the kingdom might be lost; but Lord Chief Justice Finch remarked that, the court did not judge of cases by fractions, and Holborne was compelled to go on. He began by asking the indulgence of the court if he erred in his materials or in his way of argument; that if any matter or consideration of State should come in his way he would tread as lightly as he could, but he craved liberty to pick some for their lordships consideration, promising to forbear things that were unfit. At this point Finch said to him: "Keep you within the bounds of duty as befits one of your profession at the bar at Westminster and you shall have no interruption."

Holborne replied that he would be "very wary and tender;" and after making a statement of the division and parts of his argument, said:

"Before I enter into the argument further, whether the law hath intrusted the King out of Parliament in either of the cases put: I here profess for my client and myself, that while we speak of political advice, and how far a Governor subject to error and will, may use a regal power, we do always with thankfulness to God acknowledge our present happiness, to be blessed with so just a Prince; and we fetch it from our hearts. And were his Majesty so immortal as he deserves, and sure that his successor may be heirs to his virtues as well as to his crowns, we should wish the Royal power might be free from political advice, and unlimited."

Here the Lord Chief Justice said:

"This belongs not to the Bar to talk of future government; it is not agreeable to duty to have you bandy what is the

hopes of succeeding Princes, when the King hath children of his own that are like to succeed him in his crowns and virtues."

"My Lords, for that whereof I spake; I speak as looking far off many ages, five hundred years hence.

"My Lords, because I might run into further error, if I should not take your advice, I shall slip over much; and the sum of all is:

"First, An argument from the policy of England, in the necessary attendance in the particular advice in Parliament.

"Seondly, It will be from the absolute property that the subject hath in his goods."

He went on to say that Parliament was part of the frame of the English government and stood in the way of the royal power, and

"That therefore, the King can without Parliament charge the subject in his estate, tho' in pretence for common good, no more than a prince five hundred hence, if subject to error or will, may if he will, upon any occasion, at what rate he will, charge the subject to the height."

Parliamentary restraint of the King as part of the policy of England, he asserted, was not made so much for a good King, but looking what might happen many ages after, and it was imposed upon the King, who could do no wrong, "to make him come the nearer to the Divinity in the attribute."

Passing to a consideration of the great statutes on which he and his associate relied, Mr. Holborne made the following instructive comments thereon:

"I shall offer the judgment of several ages in England; they even thought it a dangerous thing, when they thought any restraint fitting, to allow any exception whatsoever, tho' cause for it, lest the Party, that was meant to be restrained, should

be judge, and then go out when he would. Thomas of Beckett, he would not swear to the Laws of King Hen. the Second, unless he might put in this Expression, **Salvo Honore Dei**. The King never meant to violate any of these; but if that had been allowed, the Clergy had been Judges of that, therefore they would not be satisfied; at this Day we have an Experience of the opinion of Kings themselves in this case.

“I shall proceed to the practice of our Kings. In all Acts of Parliament, where they had even a desire to declare the King limited or restrained, if they did admit of any exception, they would have it in words so punctual, that they would not admit of any matter of evasion, for fear hereby his proceeding might be at large. In the grand charter of King John, **Nullum Scutagium Imponatur**, there was a clause of Exception; true, there was a reason to except how all (not as Ed. I. would have done) saving the aid due and accustomed; but the **Faire Fitz Chevalier Ec.** and so was Mag. Char. tho’ not in the Roll, so careful they were to have no words that give any such light.

“I come to the Statute of 25 Ed. I. against Aid, saving the antient aid due and accustomed; no doubt but in these words there was no more saved than law must allow the King, and the Parliament did so mean; yet when that same Act came out, the subject was not satisfied, and therefore the **Statute De Tallagio Non Concedendo** was made to take away the Exception in that Act. The Statute 28 Ed. I. after the Confirmation of two Charters, and divers additions, there comes at least a **Salvo Fure Cornuæ**. Your Lordships will find in History how all this was satisfied. And 29 Ed. I. at a Parliament held at Lincoln, the King made a Confirmation without a Salvo, and yet none will deny the right of the Crown; the Lords did intend to preserve that. Thus your Lordships see the opinion of this kingdom, from time to time, how careful they ever were in all their acts, to leave the way whereby that which they did intend for their good might be avoided. Now whether in this case there might not be an avoidance I humbly leave it to your Lordships Judgments.

“But before I go further, it may be demanded, how came in those savings into those acts, if the parliament did not like them, and if they were put in here was a trust?

“I shall give a double answer in the case; tho’ a Salvo, yet it will differ from our case; the King was not judge there, but your Lordships are judges between the King and his people: but in this case the King is to be judge of the necessity.

“But to give you the true answer, the exception never came in originally from both houses, but from the Lords themselves; this may seem strange. It was the difference of those times and ours in making acts of parliament. Those were not times of granting all, or denying all, but to answer some as to some part, and sometimes an exception. And this being read, the act drawn up upon the whole by the King’s Council; and this mischief was found out 5 Hen. IV. and from that time all petitions were wholly granted or denied. So your Lordships see how these savings came in, not by the subjects, but by the penning, of the acts by the King’s Council. The last example is in late times in the late parliament, in the Petition of Right now printed, which was long in debate in Parliament against loans and billeting of soldiers. After the petition has passed the Lower House, that those things were against the law, there was a proposition in the Upper House concerning the addition of a clause of saving. Upon the journals it appears, that there were several conferences between both houses, where the reasons are mentioned, and do appear. And in the several conferences the commons did not yield, but the petition passed absolutely; and the reason was because to put in that saving was to undo the petition.”

The Solicitor General had thrown as much discredit as he could upon Magna Carta, the Statutes Confirmationes Chartarum, de Tallagio Non Concedendo, and the Petition of Right, and he had magnified the saving clauses in the first two. Mr. Holborne answered him by pointing out that Magna Carta of King John prohibited the King

from imposing scutage or aids except by consent of the Great Council; that scutage was a military service due from tenants by which an army of above 40,000 men could be raised for the defence of the realm, and that aids were from the commons as subjects of the King; and he argued that if scutages could not be imposed without consent, although they were for defense, aids for defense could not be distinguished from other aids, and they were included in the prohibitory provision, *Nullum scutagium vel auxilium ponatur in regno nostro*, etc., and they were not within the saving clause reserving to the King, aids for the ransom of his person, for the marrying of his eldest daughter and for the making of his eldest son a Knight. He insisted that when Henry III. confirmed Magna Carta, the lords demanded the confirmation of the charter of King John and that it was read and confirmed verbatim. In proof of this he referred to a statement of Mathew Paris who lived in the King's Court and ate with him at his table and who would not have dared to have written it if it had not been true. He said the original parliament rolls had perished by fire or some other mischance, and that they had been subsequently written up, and acts of a later time included, all with the same hand.

Holborne made an elaborate reply to the argument that the Statute de Tallagio was not an act of parliament and contended that the recital in the Petition of Right that it was a Statute, expressing as it did, the judgment of parliament, was entitled to reverence.

Mr. Holborne declared that Magna Carta as confirmed by Edward I. was no more than the common law of England and that the King did not have in any case unlimited authority to charge the subject. If the King

made a grant of an office, fair, or market, and fixed the tolls to be charged the subject, as pontage or paueage for the bettering of passages, and the sum fixed was greater than the benefit the subject would receive, that is unreasonable, the law doth make it void; and he argued that if the law was thus careful in small things, as penny matters, it did “not leave the subject at the absolute liberty of the King to charge the subject when he will say the kingdom is in danger, and where there is no judge at all.”

On the third day of his argument Mr. Holborne referred to numerous instances in the parliamentary history of England where it was expressly declared or assumed that the consent of parliament was necessary to the validity of a charge or tax whether levied for defense of the realm or for a foreign war. On the fourth day he replied to the historical examples relied upon by the solicitor general by showing that whenever the King had charged his subjects without their consent in parliament his power to do so was decried by them, and the practice was outbalanced by the contrary opinion and claim of the kingdom. He contended that a practice or custom could not become a law unless it was so frequent and general as to amount to the tacit consent of the whole realm, and if it appeared that there was no consent, no law. Reviewing the precedents relied on by the solicitor general he demonstrated that they were not sufficient to show that the practice had become part of the law of England. Finally he argued that whatever the King might do in case of an actual invasion and imminent and immediate danger, he had no power to charge the subject on a mere apprehension of war or fear that there might be a war.

In conclusion he assailed the writ before the Court on the ground that it did not provide for any method of ap-

portionment but left the assessment of the tax to the sheriff and while the law might trust the King it was a question, whether it would trust the sheriff; that in all cases of public charges the law takes an especial care to make an equality, by making the assessment upon hides of land or fifteenths of movables; that "If a Hundred be charged they have ways to lay it on themselves proportionately."

Some of the historians credit Mr. Holborne with having made a stronger and more pronounced constitutional argument than Mr. St. John, but he did no more than what would naturally follow to the counsel making the closing argument for Mr. Hampden. Mr. Holborne was probably the better logician, Mr. St. John the more adroit and skilful advocate. Together they were a pair worthy of the cause, and a great honor to the profession.

The Attorney General made the closing argument in a dogmatic and declamatory speech for the king. Knowing that the Court was with him, and would stay with him, he was not compelled like the counsel for Mr. Hampden, to speak with bated breath. He claimed that the Kings of England had always been absolute Kings; that the ancient Britons were ruled by Kings; that the Roman prefects could command what they pleased; that the Saxon Kings had uniformly exercised the power of compelling the people to maintain a navy, and that this was part of the laws of England as confirmed by William I; that the crown of England makes the King of England, not as his subjects are, a natural body, but a body politic; freeth him of all imperfection and infirmity; he is immortal and never dies, the King ever liveth;" and "that the King he is *vicarius Dei*; his power as was agreed is *jure divino*. God is the God of Hosts, and the King is the model of God Himself."

The Attorney General referred to many things in the history of English law in justification of the legal theory that the King is supreme; that he had dominion of the land, and the sea, and of the soil under the sea; that he has a supreme jurisdiction over the land and the sea; creates all of his great officers and judges and the admiralty; has power to pardon offenses; to advance or debase the coin; to declare war and conclude peace; and to do numerous other things in virtue of his royal power.

The Attorney General mentioned the researches of Mr. Noy, his predecessor, and had no difficulty in citing many precedents, where the King had commanded the defense of the realm by the inland and as well as the maritime counties, without the advice of parliament and during the very years and sometimes during the actual sessions of parliament; and he argued "that precedents that are not against the law, nor contrary to the rules or reasons of the law, make a law."

On the third day of his argument the Attorney General contended that Magna Carta of King John was of no force because it was obtained by duress when there was a war or rebellion between the barons, commonalty, and the king; that it had not been since confirmed and "the reason for it is that it trencheth too much upon the prerogative of the King and Crown;" and if it was an act, its general words did not extend to take anything away that belongs of common right to the Crown." In support of this kind of construction he referred to the provision that no man should be deprived of his life, property or liberty "except by the judgment of his peers or the law of the land," and asserted that it in no way impeached the royal power for the royal power is the law of the land.

He adopted the same line of construction in his consideration of the confirmatory statutes of Edward I. and the Petition of Right, and as to the latter he made this statement:

“My Lords, in the next place they insisted upon the Petition of Right, 3 car.

“It was never intended that any power of the King by his prerogative should be taken away or lessened by it. I dare be bold to affirm for I was of that parliament, and present at the debate, that there was never a word spoken in the debate of taking away any power of the King for the shipping business.”

“Besides it is declared, assented unto and denied by none, that there was no intention, by the Petition of Right, to take away the prerogative of the King. The King did thereby grant no new thing, but did only confirm the ancient and old liberties of the subject?”

Mr. Holborne’s argument that exceptions had been inserted in acts of parliament by the King’s Council in the penning of them, the Attorney General regarded as scandalous, and that such assertions against the records ought not to be made.

He insisted that tonnage and poundage were granted for the ordinary defense of the realm, but not for extraordinary occasions; and he cited a large number of cases in the Court of the Exchequer where proceedings were instituted to compel the payment of charges imposed by the king without the consent of parliament.

In conclusion he said that “originally by the institution of the laws of the realm,” the King had this power and there were no acts of parliament taking it away from him.

“My Lords, if there were no laws to compel to this duty, yet, nature and the inviolate law of preservation ought to

move us. These vapors that are exhaled from us will again descend upon us in our safety, and in the honour of our nation. Therefore let us obey the King's command by his writ and not dispute it. He is the first mover amongst these orbs of ours; and he is the circle of this circumference; and he is the centre of us all, as the lines should meet; he is the soul of the body, whose proper act is to command. "But I shall need to use no persuasions to your lordships to do justice to this cause; and therefore I shall humbly desire judgment for the King."

The Attorney General and Solicitor General presented the case of their master, the King, with marked ability and made the most of the national necessity of maintaining England's supremacy as a maritime power. The case they had compelled them to eliminate parliament from the constitution of England and to explain away, the limitations that had been placed upon the power of the crown. Charles I., was engaged in an effort to govern England without parliament and the lawyers who represented him in the case before the court gave him their full support.

Only two of the judges were to deliver their opinions at the same time, and for this reason the final judgment of the court was delayed for some months.

Bibliography. "History of England," by Samuel R. Gardiner vol. 8, pp. 271-276, contains a good account of the ship-money case. The report of the case in Hargrave's State Trials, and Howell's State Trials is very long, and to read it requires time and patience. To relieve my readers of the task, and partly for fear many of them never will take the trouble to read it, I have made the above review of the arguments in the case.

VIII.

THE LEGISLATIVE.

(Continued).

The Ship-Money case of King v. John Hampden—Opinions of the judges—Seven for the King—Five for Hampden—Three of the five on technical grounds—Review of the opinions.

Sir Francis Weston, one of the Barons of the Court of Exchequer, was the first to deliver an opinion in the Ship-Money Case. He held that the demurrer of Mr. Hampden admitted the danger which he thought on the whole record was sufficiently alleged. He had some difficulty in disposing of the statutes de Tallagio non Concedendo, the 14 Edward III., and the Petition of Right, but reached the conclusion that they were not intended to prohibit the King from charging the subject for the defense of the realm, and if they had that intent, they must give way to the necessity of defending the kingdom to prevent it from being lost.

His opinion concludes :

“For my own part I am persuaded in my conscience that there is imminent danger; I am satisfied in it, both by the King’s writ and that which is apparent to every one; and there is a necessity this danger should be prevented. I do conceive this writ to be grounded upon this danger of necessity; and that the danger appears sufficiently in the writ. Therefore I conceive that the proceedings are legal and that there is good and sufficient cause to charge Mr. Hampden and that he ought to pay the 20s. assessed upon him.”

Sir Edward Crowley, one of the Justices of the Common Pleas, went a step farther. Referring to the confirmatory statutes of Edward I. and 14 Edward III., he said:

“Admit, I say, there were an express act that the King, were the realm in never so much danger, should not aid from his subjects, but in parliament, it is a void act; will any man say such an act shall bind? This power is as inseparable from the crown as the pronouncing of war and peace is; such act is manifestly unreasonable and not to be suffered; saith Doctor and Student, to follow the words of the law, were in some cases injustice and against the good of the commonwealth; wherefore in some cases it is necessary to leave the words of the law and to follow that which reason and justice requireth; and to that extent equity is ordained, which is no other but an exception of the law of God, or law of reason, from the general rules of law. This imposition without parliament appertains to the King originally and to the successor ipso facto, if he be a sovereign in right of his sovereignty from the crown. You cannot have a King without these royal rights, no, not by an act of parliament.”

Sir Robert Berkley delivered a very long and elaborate opinion in favor of the King. To give weight to his argument he started out by admitting that the subjects of the King of England “have a birthright in the laws of the Kingdom” and that “no new laws can be put upon them; none of their laws can be altered or abrogated without common consent in Parliament;” but beyond this limitation he held that the Kings of England were absolute monarchs; that from before the time of the Roman occupation of England, the frame of the kingdom had been, and was still, monarchial; “and our gracious sovereign is a monarch and the rights of free monarchy appertaineth unto him;” that he had never heard or read that the law was King, but that the King

is law, a living, speaking and acting law, for otherwise, he could not understand "how the King's majesty may be said to have the majestical right and power of a free monarch."

He held that 14 Edward III. was only intended to be temporary, during the continuance of the wars then on foot, and that the statutes of Edward I. and the Petition of Right should not be given a literal exposition and that charges for the defense of the kingdom were "clean out of the law as fully as if they had been precisely excepted," and that if construed according to the letter only, laws made for the good of the commonwealth would prove the bane and ruin of it.

Sir George Vernon, one of the Justices of the Common Pleas, delivered a very short opinion, in which he held that the King could charge his subjects for the safety and defense of the kingdom notwithstanding any act of Parliament and that a statute derogatory from the prerogative does not bind the King, and that the King could dispense with any law in cases of necessity.

Sir Thomas Trevor, one of the baronets of the Exchequer, first complimenting the counsel in the case, expressed himself in a short opinion to the effect that the government of England was monarchial; that a democratical government was never in the Kingdom; and the King "hath as much power and prerogative belonging to him as any prince in Christendom hath."

Sir George Croke, one of the Justices of the King's Bench, has the honor of being the first one of the twelve Judges to deliver an opinion in favor of Mr. Hampden. He first spoke from the bench, and subsequently prepared

a more elaborate opinion, which was presented to the King. He summarized his rulings in both opinions, and as thus stated by himself he held:

1. That the command of the ship writ before the court to make ships at the charge of the inhabitants of the county was illegal and contrary to and absolutely against the common law, not being by authority of Parliament.
2. That if at the common law, it had been lawful, yet the writ was illegal, being expressly contrary to divers statutes prohibiting a general charge to be laid upon the commons in general without consent in Parliament.
3. That it is not to be maintained by any prerogative or power royal.
4. That no necessity or pretense of danger can give for the writ, for if the writ be against the common law, no pretense of danger can warrant it.
5. That the writ was the first of the kind ever devised, and if it were legal to lay such a charge upon maritime ports, yet, to charge an inland county with making ships and furnishing them with masters, mariners and soldiers at their charge, which are far remote from the sea, is illegal and not warranted by any former precedent.
6. That there was not any one precedent nor record judicial, or judgment in point of law, for the writ.

Strong and absolute as these propositions of law were,

Croke sustained each and every one of them with irrefragable proofs and arguments. He said that the chief argument for the King had been a multitude of records and precedents and he confessed that when he "heard these records cited and so learnedly and earnestly pressed by Mr. Solicitor and after by Mr. Attorney to be so clear that they might not be gainsaid, especially when his brother Weston, and his Brother Berkley, who had seen the records, pressed some of them and relied upon them for the reason of their judgments, he was much doubtful thereupon, until he had satisfied his judgment therein. He stated that he had read every one of them verbatim, and that there was not any precedent or record of any such writ sent to any sheriff of any inland county to command the making of ships at the charge of the county; but this was the first precedent that ever was since the Conquest that is produced in this kind.

He proceeded to show by an examination of each record in detail that the ship writs that were issued in prior reigns were simply writs to array the existing ships of the maritime ports and counties, and not to make ships, and that these writs did not issue to the inland counties because their inhabitants had no ships to array, but writs issued to them to array their fighting men as soldiers to defend the realm.

The Solicitor General had placed much reliance on the extra-judicial opinion of all the judges that these ships writs were legal.

Croke replied :

"To this Opinion, I confess, I then with the rest of the judges subscribed my hand; but I then dissented to that opinion and then signified my opinion to be, that such a charge could not

be laid by such a writ, but by Parliament; and so absolutely in that point one other did agree with me, and dissented from that opinion; and four others, in some other particulars, from that which was subscribed. But some great part seeming absolutely to be resolved upon that opinion, some of them affirming that they had seen divers records and precedents of such writs, satisfying them to be of that judgment; I was pressed to subscribe with them for that the major part must involve the rest, as it was said to be usual in cases of difference, and for that the lesser number must submit to the major, in opinion against one, or two where there are five judges, judgment is to be entered *per curiam*, if the major part agree, and the others are to submit to it: and in case of conference and certificate of their opinions, if the greater part did agree and subscribed, the rest were to submit their opinions. And this by more ancient judges than myself was affirmed to be the continual practice. And that it was not fit, especially in a case of this nature so much concerning the service of the king, for some to subscribe, and some to forbear their subscriptions. And that altho' we did subscribe, it did not bind us, but that in point of judgment, if the case came in question judicially before us, we should give our judgments as we should see cause after the arguments on both sides, and we were not bound by this sudden resolution.

"Hereupon I consented to subscribe; but I then said, that in the meantime the King might be misinformed, by our certificate under our hands, conceiving us all to agree together, and to give him this advice under our hands, and not know there was any dis-assented or was doubtful; but it was then said, the King should be truly informed thereof; and thereupon we that dis-assent, did subscribe our hands with such protestations as aforesaid, only for conformity, altho' contrary to the opinion I then conceived.

"But this being before arguments heard on either side, or any precedent seen, I hold that none is bound by that opinion. And if I had been of that opinion absolutely, now having heard all the arguments on both sides, and the reasons of the King's

Counsel to maintain this writ, and why the defendant is to be charged; and the arguments of the defendant's counsel against the writ, and their reasons why the defendant should not be charged to pay the money assessed him; and having duly considered of records and precedents cited and shewed unto me, especially those of the king's side, I am now of an absolute opinion that this writ is illegal, and declare my opinion to be contrary to that which is subscribed by us all. And if I had been of the same opinion that was subscribed, yet upon better advisement being absolutely settled in my judgment and conscience in a contrary opinion, I think it no shame to declare that I do retract that opinion, for *humanum est errare*, rather than to argue against my own conscience. And therefore none having, as I conceive, removed those difficulties, I shall proceed to my argument, and shew the reasons of my opinion, and leave the same to my Lords and Brothers. Not one precedent nor record in any precedent time, that hath been produced or shewed unto me, that doth maintain any writ, to lay such a charge upon any county inland or maritime.

Justice Croke first took up for consideration the common law on the subject. He had begun writing law reports in 1581 when he was twenty-one years old, and had acquired habits of care and discrimination in the examination of records. He wrote his opinion as presented to the King in 1637, when he was in his seventy-seventh year, and at a time when but little was known of the old Anglo-Saxon records, and not much more of those of the reigns of the Norman kings of England. Nearly five and three-quarters centuries had elapsed since the battle of Hastings and it was not until about two centuries later that Kemble dug up the Anglo-Saxon records first published in the *Codex Diplomaticus*.

It is a credit to Croke's legal attainments that the common law as to the imposition of general charges or taxes was what it is now known to have been. He placed his

reliance on records and writings subsequent to the conquest in which it was held or assumed, without reference to statutory requirements, that no general tax or charge could be imposed without the consent of the common council of the kingdom. He closed this part of his opinion with the following comments on a parliamentary record of 1379:

“2 Ric. II., par. 1. The parliament roll proveth this directly; although it be no act of parliament, yet, the record is much to be regarded, for it sheweth what the law was then conceived to be: for Scroppe, the lord chancellor, then shewed to all the lords and commons assembled in parliament, that all the lords and sages had met together since the last parliament and having conferred of the great danger the kingdom was in, and how money might be raised in case of imminent danger, which could not stay the delay of a parliament, and the king's coffers had not sufficient therein; the record is, they all agreed moneys sufficient could not be had without laying a charge upon the commonalty, which, say they, cannot be done without a parliament; and the lords themselves, for the time, did supply the said necessity with money they lent: which record proveth directly, that this charge without an act of parliament is illegal.”

Passing from the common law to a consideration of the statutory law on the subject, Croke made the following exposition of the great statutes which constitute the charters of English liberty.

“I conceive, if the common law were doubtful in this, whether such a charge might be imposed by writ; yet it is made clear by divers express statutes, that the king is not to lay any charge upon his subjects, but by their consent in parliament; and that is, by many acts of parliament in force and not repealed: and there is no doubt but that the king by oath being bound to perform the statutes of his realm.

“The Statute of 25 Ed. I, cap. 5, which is in these words, “forasmuch as divers people of our realm are in fear, that the aids and taxes which they have given us before-time towards our wars, and other businesses of their own grant and goodwill, however they were made, might turn to a bondage of them and their heirs; because they might be at other time found on the roll; and likewise for the prises taken throughout our realm by our ministers; we have granted for us and our heirs, that we shall not draw any such aids, taxes or prises into a custom, for any thing that hath been done heretofore, by any roll, or any other precedent that may be found’.

“Ibid, cap. 6. ‘Moreover, we have granted for us and our heirs, as well to archbishops, bishops, priors, and other folk of the holy church; as also to earls, barons, and all the commonalty of the land; that for no business from henceforth we shall take any aids, taxes, nor prises, but by the common assent of the realm, and for the common profit thereof, (saving the ancient aids and prises due and accustomed) which are the express words of that statute. Now, what those ancient aids were is well known, that they were *ad redimendum corpus, ad filium primogenitum militem faciend et ad filiam primogenitam maritand.*” Which aid concerns not the subject in general, but particular men were liable thereunto by their tenures. So this saving need not to have been; for the body of the act extended not to them, but to the general aid of the kingdom.

“However, if this salvo, as it hath been objected, would preserve this aid now in question, yet the statute made afterwards, *de tallagio non concedendo*, being without any salvo, takes it away; which statute, Rastal in his abridgement, fol. 441, in his title to taxes, abridgeth in this manner: ‘Anno. 25, Ed. I, it is ordained, that the taxes taken, shall not be taken in custom nor but by the assent of this realm, except the ancient aids and taxes: and there the tax of 40s. upon the sack of wool is released.

“Ibid. ‘That no tallage, by us or our heirs in our realm, be

put or levied, without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other free commons of our realm; that nothing be taken from henceforth, in the name or by reason of maltout' of a sack of wool. Statute de tallagio non concedendo."

"Object. Mr. Solicitor laboured much to prove, that there was no such statute, de tallagio non concedendo: 1, for that it was not to be found on the rolls of parliament. 2. For that it was not set down when it was made. 3. That it was but an abstract out of confirmatio chartarum libertatum. Mr. Attorney said, he would not deny it to be a statute, neither would he affirm it; but that yet it did not extend to take away the aid demanded, by prerogative or power royal for the defence of the kingdom.

"Response. To this I answer, this was never doubted to be a statute until this argument; and that it is a statute, appeareth: 1. For that it is printed in the book of statutes, for a statute. 2. It is recited in the Petition of Right, to be statute. To that it is not found on the rolls, answer, that many statutes that are known statutes, are not found on the rolls, as Mag. Char, is not.

"And as to touching the time, I conceive it to be made 24 Ed. 1, cap. 1, for so it is set down in the great book of statutes, printed 1618, to be the first statute therein made, viz., in these words: No tallage nor aid shall be taken or levied by us or our heirs, in our realm without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land.

"And that it is a statute, all my brothers have agreed.

"The only doubt then is, whether this statute extendeth to aid for the defence of the kingdom; which I think it doth: for it is the precise words of it, that no tallage or aid shall be imposed but by grant in parliament, which extends to all manner of aids; and by this law the subjects of England have defended themselves ever since, as with a buckler, as faith Bodinus, fo. 97, whereby it appeareth, that notice was taken

of this law in foreign parts, and so held still to be a statute in force.

“The next statute is 14 Ed. III, cap, 1, which recites the grant of the great subsidy of the ninth fleece, the ninth lamb, etc., formerly granted; whereupon these words follow: ‘We are willing to provide for the indemnity of the said prelates, earls, barons, and others the commonalty of the realm, and also of the citizens, burgesses, and merchants aforesaid, will and grant for us and our heirs, to the same prelates, earls, barons, and commons, citizens, burgesses, and merchants, that the same grant shall not be had forth in example, nor fall to their prejudice in time to come, nor that they be from henceforth charged or granted to make any aid, or sustain any charge, if it be not by the common assent of the said prelates, earls, barons, and other great men and commons of the said realm of England, and that in the parliament; and that all the profit arising of the said aid, and of wards, marriages, customs, and escheats, and other profits, arising out of our said realm of England, shall be set and dispended upon the maintenance of the safe-guard of this realm of England, and of our war in Scotland, France, and Gascoigne, and in no place elsewhere during our war.’

“By this statute it appeareth that it is expressly provided that the subjects should not be from thenceforth charged nor grieved to make any aid, nor sustain any charge but by common assent, and that in parliament; which is as express as may be and exclusive to any charge otherwise; which I conceive was against the appointment of making, or preparing and sending out of ships at the charge of the towns wherein they were, or sending men out of their own counties at the charge of the county.

“Object. Now, whereas it is alleged by my brother Weston and my brother Berkley, that this was but a temporary statute, and ended when the war ended, which appeareth by the last clause for employment of those profits towards those wars; I conceive it appeareth to be an absolute and perpetual statute, for it is granted for him and his heirs in perpetuity.

And also it appeareth by Plowden in his Comment, fol. 457, in Sir Thomas Worth's case, where a grant is by the name of the king, which is in his politic capacity; this extendeth against him, his heirs, and successors, altho' they be not named. Also the intendment of this law appeareth to be for the security of the subjects, from thenceforth for all future ages. And then the office of judges, as appears by Sir Edward Coke, his reports, lib. 5, fol. 7, and Plowden's comment, in Aston and Stud's case, is to construe statutes according to the true intent of the makers thereof, which was in this statute, that it should be a perpetual security for the subjects. And to little purpose it had been, to make a statute to continue but during the time of the war, or during the king's life.

“Object. Also where it is alleged that the statute of Ed. III., is not mentioned in the Petition of Right, which is some argument that it was not conceived to be continuing statute.

“Response. To that I answer, that in the Petition of Right it is said, that by the statute there recited, and other the good statutes of this realm, the subjects shall not be compelled to pay any taxes, tallage, aid, nor other like charge not set by parliament; in which the statute is as well intended as other statutes, and as far as if it had been expressly recited. Also it appeareth by all the books of statutes, that this statute is granted as a statute continuing, whereas others expired, are set down as expired.

“21 Ed. III., pars. 2 m. 11. A subsidy being granted by a Parliament, viz., 40s on every sack of wool transported before Michaelmas following, and 6d on every 20s of Merchandise for the safeguarding merchants and defence of the coast, etc. After Michaelmas, viz. 31 Octob. 21, Ed. III., by writ the collectors were commanded to continue the collection of those subsidies until Easter. But 26 Nov. 21 Ed. III., the king by writ commanded the stay of the 6d. in the 20s. and to continue the collection of the subsidies upon the sacks of wool until Easter.

"22 Ed. III., Rot. Parl. m. 16. The parliament being holden in Lent, the commons complain of the continuance of this collection of the subsidies upon the sacks of wool longer than the parliament had granted it, and provided that it should not be continued longer than Easter, at the procurement of any person. By this it appeareth, that the parliament being careful that the time for levying of a subsidy granted, should not be enlarged by any power, much less would they admit of a writ to lay a charge without grant by parliament.

"25 Ed. III., m. 8. It was enacted that no man should be compelled to find men at arms, other than such as hold by such service, except it be by common assent in parliament. By this appeareth, that if men be not compellable to find a man at arms, unless it be by common assent in parliament; much less is any bound to be contributory to the preparing of a ship with 180 men at arms, and victuals, and wages of soldiery for 26 weeks, unless it be common assent in parliament.

"Rot. Parl. 21 Hen. V. Num. 22. An act of parliament, as I count it, in the very point, is in these words: 'For that of late, divers commissions were made to divers cities and burroughs within the realm, to make barges and barringers, without assent or parliament, and other wise than hath been done before these; however the commons do pray the king that these commissions may be repealed, and that they may not be of any force or effect. To which it is answered, that the king willeth that the said commissions be repealed; which is an absolute and perfect statute. * * *

"But then there are added these words: 'But for the great necessity he hath of such vessels for the defence of the realm in case that the war shall happen, he will treat with his lords of this matter, and afterwards will shew it to the commons to have their counsel and advise in this point.' So by the record it appeareth that the commons did conceive, that no cities, burroughs, nor towns, without consent in parliament, were to be charged with the making of such vessels; to which the king agreeth. And' from that day to this, until the making of these

writs, in no age, altho' the kingdom hath been many times in danger of invasion, and hath been invaded, there do not appear any records that ever I have seen, of writs directed to any towns or cities at their charges, to make or prepare any ships or vessels whatsoever.

"Object. And whereas it hath been objected, and especially insisted upon by my brother Berkley, that this latter part, that the king will treat with his lords concerning them, and after confer with the commons, is a gentle denial of that act; as the experience is at this day. '*Le Roy se avisera*' is a denial of an act.

"Response. Hereupon I answer. It is an absolute act, for it is an absolute assent to the petition. And that which came after was but a plausible excuse, for that such commissions had gone out; and this farther consultation never appeared to be made, nor ever any such writ or commission for such vessel to be made went out since until this writ.

"13 Hen. IV. m. 10. A grant is of a subsidy of wools, woolfels, hides, and other things there mentioned, and of tonnage and poundage for one year, for the defence of the marches of Calais, etc., and for the defence of the realm and the safeguard of the sea. And therein is this express proviso, 'Provided, that this grant of a subsidy of wools, etc., and tonnage and poundage, in time to come, shall not be taken in example to charge the lords and commons of this realm with any manner of subsidy for the safeguard of Calais, etc., nor for the defense of the realm, nor the safeguard of the seas, unless by the will of the lords and commons of the realm, and that by a new grant to be made and that in full parliament to come.' By this appeareth that it was then provided, that no charge should be laid on the lords or commons, no not for the defence of the realm, but by grant in full parliament.

"13 Hen. IV. m. 43. A petition was in parliament reciting, that there was an office granted of Alnager within London and the suburbs of the same, with fees to that appertaining, where any such office never was, nor any such fees

appertaining thereunto; and that by colour thereof, they levy one half-penny of the buyer and a half-penny of the seller, and upon sale of every hundred ells of canvas a penny of the seller and a penny of the buyer, wrongfully against the statutes in the time of your highness's progenitors made to the contrary, by which it is ordained and that no tallage nor aid shall be granted nor levied without assent and consent of the lords and commons of your realm, as by the said statutes is fully declared; wherefore they prayed that such letters patents made thereof shall be void and holden for none. And this was granted; whereby it appeareth that it is declared then in parliament, that those statutes were and did continue; that no tallage or aid shall be levied without grant in parliament.

“I. Ric., II., c. 1. It is enacted in these words: ‘Our sovereign lord the king remembering how the commons of this realm, by new and unlawful inventions, and inordinate covetize, have, against the laws of this realm, been put to great servitude and importunate charges and exactions, and especially by a new impost, called a benevolence, whereby divers subjects of this land, against their wills and liberties, have paid great sums of money, etc. It is enacted and ordained, that the subjects and commons of this realm from henceforth shall in no wise be charged by such charges or impositions called a benevolence, or such like charge: And that such exactions called a benevolence, before that time taken, shall be taken for no example to make any such, or any like charge, from any of his subjects of this realm hereafter, but shall be damned and nulled forever.’ By this it appeareth that it is expressly provided that the subjects shall not be charged by way of benevolence which is in nature of a free gift, nor such like charge; that is no charge of money shall be laid upon the subjects upon any pretence whatsoever, be it for defence in time of danger, or guarding the sea.

“The last and concluding statute is the Petition of Right,

made in the third year of his majesty's reign, reciting that it was enacted by a statute made in the time of Edward I., commonly called *Statutum de Tallagio non Concedendo*, that no tallage or aid shall be laid or levied by the king or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, and others the freemen of the community of this realm. And by a statute of 25 Ed. III. That none shall be compelled to make any loans to the king, because such loans were against reason and franchise of the land. And by another statute, that none shall be charged by any impositions called a benevolence. By which statutes, and other the good statutes of this realm, your subjects have inherited the freedom that they shall not be compelled to contribute to any taxes, tallage, aid, or other like charge not set by parliament.

"And then they pray that none be compelled hereafter to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament. And after five other things there mentioned, the conclusion is: 'All which they pray as their rights and liberties.' Unto which the king answers, 'Let right be done as is desired.' Which is a full and perfect statute, showing in this point the liberty of the kingdom prayed and allowed; which was not done without the advice of the judges, whereof I was one, whose opinions were then demanded and resolved that the same did not give any new liberty, but declared what the liberty of the subject was in this amongst others, that they should not be compelled to be contributory to any tax, tallage or aid, nor any like charge not set by parliament. All which statutes, those of 25 Ed. I., 34 Edw. and 14 Ed. III., being in the negative and in force, I conclude that these writs to lay such a charge is against the law, and so the assessments by colour thereof unlawful."

Sir William Jones, one of the justices of the Kings Bench, delivered an opinion in favor of the king. He was somewhat annoyed and perplexed by the outburst of

popular approval which had greeted Croke's opinion. He said:

"I say it is a great case; it concerns the king in his royal prerogative and the subject in his interest, in his land and goods, and liberty of his person. They that have spoken already, and they that shall speak after me, shall hardly escape the censure of the people, of some that have some understanding, of some peradventure that have less, and of some that have none at all, but speak according to their opinions, affections, or wills. **Faelices assent artifices, si per solos artifices judicarenter:** we should be happy to be judged by them that are learned; but when it is by them that understand not, then it is turned into calumny and reproach.

"Some have taxed them that have gone, or will go with the king, as tho' they were fearful, and went about to captivate the liberty of the people, and take away their goods. Some are taxed on the other side, if on the contrary, that they are given to popularity: so as I may say as the Psalmist, **Domine, me posuisti in lubricoloco**; for it is impossible to escape their tongues, and between those two decks of censure I am like to fall. And however I may fall with my sentence, with God's grace I shall make no ship-wreck of my conscience.

"I am trusted by the king to display his justice equally to all, and sworn to dispense his just prerogative, as well as the subjects liberty: and if we do otherwise than as judges, we do as false men. If any man offend contrary to his oath, he doth forfeith his lands, goods, and tenements. I shall not therefore for any respect do against my own conscience; but descend to give judgment, not regarding the watry mouths of others."

Justice Jones, as he expressed it, was an old man, and ready for the grave, and he wished his tongue and his heart to go together. His opinion indicates that he was an able and conscientious judge. He held that it was the duty of the king to defend the realm on the land and on the sea, and that the right to issue ship-writs in case

of great danger was necessary to enable him to perform this duty. He made a distinction between charges imposed for the private use of the king, and charges imposed for defence; and his opinion upon this whole matter was, that judgment should be given against Mr. Hampden for the 20s with this limitation, that none of it should come to the king's purse, for if it did, his opinion was against it. There is one passage in Jones' opinion that should be quoted as showing the disposition he made of one of the significant records:

"The next is 13 Hen. IV. The charges of *ld.* upon a cloth for measuring, adjudged void. I conceive it was not adjudged void upon that point. True, in parliament it was complained of as a grievance to the subject; but every petition in parliament doth argue a right: it may be it was *ad damnum*, yet *absque injuria*; that case differs much from this, for there was a charge to a private benefit, and no regard to the public, which perhaps the law will not allow, but where there is a **quid pro quo**; nor of the case of dice, cards, monopolies, those cases nothing like this: so the commission of sewers may lay a charge for the repair of a bank; when the lands are overflowed, and the owners be not able, the neighborhood must be taxed; so in case of a bridge."

Sir Richard Hutton, one of the justices of the Court of Common Pleas, followed in an opinion strongly supporting Justice Croke, and in which he replied to the arguments of Justice Jones. On the effect to be given to the record of 13 Hen. IV., when it was held by parliament that the king could not fix the fees of an officer appointed by him, he said:

"For the authority of the year-books; I will confirm those two authorities cited by my brother Croke, tho' my brother Jones slight the authority, 13 Hen. IV. the principal case, being then a grant of an office of measuring cloth, and put in practice; and being granted out of parliament condemned to be

void; for the king can not grant any common charge on his people but in Parliament. And thro' my brother Jones said that perhaps such a charge was *damnum* yet, not *injuria*; surely had there not been more in it, it had not been damned as illegal.

Sir John Denham, one of the barons of the Court of Exchequer, was very old and ill, and not able to be present during all of the argument. He held in favor of Mr. Hampden on the ground that the King's majesty being of a corporate capacity could not take any lands or goods from any of his subjects but by and upon a judgment in the Exchequer, or some other court of record.

Sir Humphrey Davenport, chief baron of the Exchequer, on the main question adhered to the extrajudicial opinion of the judges, but decided in favor of Mr. Hampden on a number of grounds, which very much restricted the king in the exercise of his prerogative of defending the realm. He held that the ship writ issued in this case was not good in law, because it was directed to the sheriff, mayor, bailiffs and burgesses, of an inland county, to prepare a ship for service, and as they had no ships it was impossible to be performed; and that the power of taxation conferred on the sheriff by the writ was not legal, because the sheriff could not tax himself; he could not bind himself in default; and he could not commit himself to prison there to remain till such time as the king should deliver him; that the sheriff could not be given power to tax at his discretion, but should be required to summon a jury of assessors of four in each town to make the assessments, and that two other assessors should tax the four assessors.

Davenport agreed that the king was the sole judge of

the existence of danger, and that his finding on that question as set forth in the writ could not be traversed, but this writ was defective because it contained no expression that the kingdom was in immediate danger; that the power to issue such writs in anticipation of a future danger had been taken away since the time of Henry II. by statute, 25 Edward I., and other statutes.

He further held that the ship writ, not being returnable, had spent its force, and could not be revived by the *certiorari* and the *mitimus*; that the writ of *scire facias* could not be sustained because the ship writ directed that the money should only be used to prepare a ship, and it did not appear that one had been prepared, or whether there had been a surplusage of money collected, and there was nothing in the record to bring the money to the king, who was not as the record stood, entitled to a judgment for it.

He further held, that the record was not sufficient to charge Mr. Hampden because the *mitimus* only set forth the tenor of the record, when the record itself should have been certified, for otherwise two executions might issue on one judgment.

Sir John Finch, Chief Justice of the Court of Common Pleas, had suggested the issue of the ship writs to the king, and was called their inventor. He delivered a lengthy opinion in favor of the king, and went so far in defense of the royal prerogatives as to excite great popular disapproval.

Finch declared that the sea and the land make but one kingdom, and that the king is the lord and sole proprietor of the sea, and is sovereign of the sea, and that without a navy this authority could do but little good.

“The king holds this diadem of God only, all others hold their lands of him, and he of none but of God; but this is but to light a candle for others. From hence only I will observe, that none other can share with him in his absolute power.

“A Parliament is an honourable court; and I confess it an excellent means of charging the subject, and defending the kingdom; but yet it is not the only means. An honour the last with more respect remember than myself, when they were pleased to choose me for their speaker. And as my brother Hutton said, I conceive it a fit way to charge the subject, and I wish that some, for their private humour, had not sowed the tares of discontent in that field of the common wealth, then might we have expected and found good fruit. But not the best way to redeem this lost privilege (for which we may give those only) is to give all opportune appearance of obedience and dutifulness to his majesty’s command.

“The two houses of Parliament without the king cannot make a law, nor without his royal assent declare it: he is not bound to call it but when he pleaseth, nor to continue it but at his pleasure. Certainly there was a king before a parliament for how else could there be an assembly of King, Lords and Commons? And then what sovereignty was there in the kingdom but this? His power then was limited by the positive law; then it cannot be denied but originally the king had the sovereignty of the whole kingdom both by sea and land, who hath a power of charging the whole kingdom.”

Finch placed the king under personal obligations to him with the following statement of the king’s good intentions:

“In the next place, I shall remove a scandal that hath been put upon the king, how that his majesty hath meant to make a private personal profit of it.

“What he hath done is well known; and I dare confidently say, all hath been spent, without any account to himself, and that his majesty hath been at great charge besides towards the same; and I heard it from his own royal mouth, he spake it to

me, and my Lord Brampton can testify as much, that he said, it never entered into his thoughts to make such use of it; and therefore said, he was bound in conscience to convert it to the use it was received for, and none other; and that he would sooner eat the money, than convert it to his use. Therefore, he that thinks that the king made a revenue of it, doth highly slander his majesty. But let kings be as David was, Men after God's own heart, yet they will not want a Shimei to rail on them."

The most noteworthy thing in Finch's opinion is his holding that the power of the king to levy taxes for the defense of the realm was supreme, and could not be taken from him even by an act of parliament. He construed Magna Carta and the other great statutes from that standpoint, and so far as they impaired this prerogative of the king, he held them void. The constitutional article in Magna Carta he construed as restrictive of the power of the king to levy taxes for his private benefit and for the defense of his own person, and it did not bar him from levying such as were for the public good. Finch then went on to say:

"The statute of tonnage and poundage given to the king, for and towards the defence of the sea, and the other acts of Parliament, that restrain the King's power, so that he cannot now charge the subject without his consent in Parliament, I shall answer in the next place; and before I come to the particular acts, I will shew what, in my opinion they may do.

1. Acts of Parliament may take away flowers and ornaments of the crown, but not the crown itself; they cannot bar a succession nor can they be attained by them, and acts that bar them of possession are void.

2. No act of Parliament can bar a king of his regality, as that no lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore acts of Parliament, to take

away his royal power in the defence of his kingdom, are void as my Lord Chief Baron said: they are void acts of Parliament, to bind the king not to command the subjects, their persons and goods, and I say, their money too: for no acts of Parliament make any difference. Now to the particular statute objected.

(1) 25 Ed. I., Chap. 5, *Confirmatio Chartarum*, the words are these, aids or taxes, granted to the king shall not be taken for a custom or precedent: and cap. 6. Moreover, we have granted for us and our heirs, that for no business from hence forth, we shall take such manner of aids, taxes, nor prises, due and accustomed. And cap. 7, a release of toll upon every sack of wool: and grant, that we will not take such things without their common assent and good liking, saving to us and our heirs, the customs granted by the commons aforesaid.

“As to the other statute, *de Tallagio non Concedendo*, cap. 1, *Nullum tallagium imponetur nisi per commune concilium regni nostri*, cap. 2, 3, 4, 5, etc.

First: These words must have relation to the aids before, and there be divers aids; as some by *taillage*, some by way of *prise* upon goods, and ransom of his majesty's person, etc., the king thereupon makes this grant, which hath relation to such aids as were granted voluntarily.

“Secondly: Ancient aids are there reserved, as redeeming the king's body, *pur faire fitz Chevalier, eur marier son file eigne*: and so all other ancient aids, which are to be understood with *and redimendum corpus*, etc.

And to the statute *de Tallagio non Concedendo*, in some books it is not in print, but mentioned in *Mag' Char' Rastal*, and the *Petition of Right*, 3 Car. 1628, to be in 24 or 25 Edw. I.

And therefore I answer, it is not in the *Parliament-Roll* and there is variance about it; and therefore it is but an abstract and no substantial statute.

“But since it hath passed for a statute, and possibly may be one, I agree with all the rest of my brothers, that it is a statute:

And then I answer, (1) That nullum tallagium imponetur, etc., that is, no unlawful taillage shall be imposed upon the subject without his consent; or else the aids pur faire fitz chevalier e pur file marier, had not been excepted. (2) No aids shall be imposed but by contribution of the king and people; and here the king is taxed as well as they. (3) An act of Parliament can by no means take it away, much less by those general words.

Obj. In 14 Ed. III., cap. 1. No man from henceforth shall be chargeable, but by common consent in Parliament.

To this I answer, that tho' it be but temporary in some parts, yet it is binding only secundum subjectam materiam: and the words are general, as in the other statute de tallagio, etc., besides, the practise in that king's time, and after, best interprets it.

Obj. 25 Edw. III., cap. 8. No finding of men at arms, unless by consent, much less finding of ships.

Answ. This takes not away any former law; and therefore the precedents following, 4 Hen. IV. shew that it does not reach to this case.

Obj. 2 Hen IV. m. 2, which is absolute in the point, saith my brother Croke, where a commission went forth for the defence of the sea, whereof complaint was made in Parliament, with desire that it might be repealed, and it was done.

Answ. I am of the contrary opinion; for the petition was, that it might be released and the answer was but this, that it should, but the king would treat with the council about it; and it was but a repeal of his commission then only.

Obj. 1 Ric. III., cap. 2, where the king grants, that he would not hereafter charge them by benevolence, or any such charge, but that they should be damned by the law, by no such charge or imposition, i. e., by no such charge of money.

Answ. That statute was only against benevolences, and made by a king that had reason, as we all know, to please the people for his own ends.

“Obj. 2. The statute of tonnage and poundage, granted for the defence of the sea, the words are, that no taillage or aid shall be without act of parliament. 2. That the king hath means to defend the kingdom, with a protestation not to draw it into Example, 4 Hen. IV. 13 Hen. IV. Parl. Roll. m. 10.

Answ. I will not argue whether tonnage and poundage was before this act of parliament, nor that time out of mind they were granted to the king: but my answer is, they are only for the ordinary of the sea. And the protestation of 4 Hen. IV. is a protestation of the commons only; and this charge is not taken away thereby, and tonnage and poundage is for and towards the defence of the sea: so all the acts are and so I agree.

But for extraordinaries, and but solely in case of danger of the whole kingdom, that they should not be granted, cannot be collected out of these grants.

The last objection is the Petition of Right, 3 Car. That no charge shall be imposed on the subject, but by Parliament.

Answ. I was then speaker of the lower house, and I have reason to remember what then was made. And I say: 1. There is not mention of this case. 2. There was no new thing granted, but only the ancient liberties confirmed, taking notice of the common protestation, not to bind the king from his ancient rights. 3. Look upon the prayer what is desired; and the main scope was: (1) Generally against loans, and this could not be included in these words. (2) Imprisonment without shewing cause. (3) Billeting of soldiers. And (4) Mariners lying within the land.”

Sir John Brampston, Chief Justice of the King's Bench, delivered an opinion in which he sustained the king on every point but one. As to that he agreed with Chief Baron Davenport, that no money was demanded by the king by the first writ or by the second writ, and for this reason no judgment could be given that the money be paid to the king.

Croke and Hutton have the honor of delivering opinions which were against the king on the great question of the power of the king to levy the tax. Under the opinion of Davenport not much was left of the prerogative as it could only be used in cases of immediate and sudden danger.

Denham expressed no opinion on the merits, and like Brampton, decided in favor of Mr. Hampden on a thin technicality, which, however, had this merit: It made it clear, that if the ship writs had directed the sheriffs to levy and collect the tax, and pay the money into the treasury of the king for the building of a navy, they would have been legal in the opinion of ten of the twelve judges, except that Davenport would have required a more positive expression of imminent danger.

Judgment was rendered against Mr. Hampden June 12, 1638.

BIBLIOGRAPHY. As far as I have been able to discover there is not extant any work in which the arguments of counsel and the opinions of the judges in the ship money case are carefully analyzed and stated. This is my apology for the labor bestowed upon the foregoing and the preceding lecture or chapter, and I hope they will be as interesting and instructive to others as the work of preparing them was to me. It should be borne in mind that the ship-money case arose 277 years ago, when the principle of representative taxation and legislation was yet in the infancy of its development, and that which is very plain now was not so plain then.

IX.

THE LEGISLATIVE.

(Continued.)

The Ship-Money case—The judgment of the judges in favor of the King reviewed by the House of Lords—Judgment of the House of Lords reversing the judgment of the judges—Act of Parliament declaring ship-writs illegal—Impeachment of the judges—Impeachment of the Earl of Straford and the Archbishop of Canterbury, and their execution under bills of attainder—Trial and execution of Charles I.—Constitutional documents of the Commonwealth and the Protectorate.

John Hampden as the defendant in the Ship-money case, was entitled to have the case reviewed on a writ of error by the House of Lords as the court of last resort for the ultimate decision of any civil action; but no parliament had then been summoned for nine years, and there was nothing to indicate that Charles I. would ever call another parliament.

In the spring of 1640 he was constrained to call one, but it proved refractory and after sitting three weeks was dissolved by the King, and is known as the "Short Parliament." Later in the year, the condition of his kingdom was such that Charles was compelled to convene a parliament, and Nov. 3, 1640, the sessions of that famous parliament, known as the "Long Parliament," began.

One of the first things it did was to take the necessary proceedings to reverse the judgment against Hampden. Oliver St. John had been returned as a member of the

House of Commons, and he was charged by that house, with the duty of laying the case before the House of Lords, which he did at a conference of both houses.

After the conference the Lords came to the following resolutions :

Die Mercur. 20 die Jan. 1641.

It was resolved by the Lords upon the question, **Nemine contradicente.**

1. That the ship writs, the extra-judicial opinions of the judges therein, both first and last, and the judgment given in Mr. Hampden's case and the proceedings thereupon in the Exchequer Chamber are all illegal, and contrary to the laws and statutes of this realm, contrary to the rights and properties of the subjects of this realm, and contrary to former judgments in Parliaments, and contrary to the Petition of Right.

Die Veneris 26 die Februari, 1641.

"Upon the report of the right honorable the Lords Committee appointed to consider of the way of vacating of the judgment in the exchequer concerning ship-money, it was ordered by the Lords Spiritual and Temporal in the High court of Parliament assembled, that the Lord Keeper or the Master of the Rolls, the two Lord Chief Justices, and the Lord Chief Baron, and likewise the chief clerk of the Star-Chamber shall bring into the upper house of Parliament the record in the Exchequer of the judgment in Mr. Hampden's case concerning ship-money and also several rolls in each several court of King's Bench, Common pleas, Exchequer, Star Chamber and Chancery, wherein the judges extra judicial opinions in the cases made touching ship-money be entered and that a **Vacat** shall be made in the upper House of Parliament of the said several records: And likewise the judgment of Parliament touching the illegality of the said judgments in the exchequer, and the proceedings thereupon; and touching the illegality of the extra judicial opinions of the judges in the said several courts, concerning ship money, be annexed and apostiled unto

the same. And that a copy of the judgment of the Parliament concerning the illegality of the said judgment in the exchequer, and the said extra-judicial opinions of the said judges concerning ship-money be delivered to the several judges of Assize; and that they be required to publish the same at the assizes in each several county within their circuits, and to take care that the same be entered and enrolled by the several clerks of Assizes; And if an Entry be made by any Custos Rotulorum, Clerk of Assize of the said judgment in the Exchequer or of the said extra-judicial opinions of the judges, that **Vacata** be made thereof, per Judicium in Parlamento: And that an act of parliament be prepared against the said judgment and extra-judicial opinions, and against the proceedings touching ship-money.

“AN ACT FOR THE DECLARING UNLAWFUL AND VOID THE LATE PROCEEDINGS TOUCHING SHIP-MONEY, AND FOR THE VACATING OF ALL RECORDS AND PROCESS CONCERNING THE SAME.”

WHEREAS, divers writs of late time issued under the great seal of England, commonly called Ship-Money Writs, for the charging of the ports, towns, cities, boroughs and counties of this realm respectively to provide and furnish certain ships for his Majesty's service: (2) And whereas upon the execution of the same writs and returns of certioraries thereupon made, and the sending the same by mittimus into the court of exchequer, process hath been thence made against sundry persons pretended to be charged by way of contribution, for the making up of certain sums assessed for the providing of the said ships, and in especial in Easter term in the thirteenth year of the reign of our sovereign Lord the King that now is, a writ of **scire facias** was awarded out of the court of exchequer, to the then sheriff of Buckinghamshire, against John Hampden, esquire, to appear and shew cause, why he should not be charged with a certain sum so assessed upon him; (3) upon whose appearance and demurrer to the proceedings therein, the barons of the exchequer adjourned the same case into the exchequer-cham-

ber, where it was solemnly argued divers days, and at length it was there agreed by the greater part of all the justices of the courts of king's bench, and common pleas, and of the barons of the exchequer, there assembled, that the said John Hampden should be charged with the said sum so as aforesaid assessed on him; (4) the main ground and reasons of the said justices and barons which so agree, being, that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, the King might by writ under the great seal of England, command all the subjects of this his kingdom, at their charge, to provide and furnish such number of ships with men, victuals and munition and for such time as the king should think fit, for the defence and safeguard of the kingdom from such danger and peril, and that by law the king might compel the doing thereof, in case of refusal or refractoriness; (5) and that the king is the sole judge, both of the danger and when and how the same is to be prevented and avoided; (6) according to which grounds and reasons, all the justices of the said courts of king's bench and common pleas and the said barons of the exchequer, having been formerly consulted with by his Majesty's command had set their hands to an extra judicial opinion, expressed to the same purpose; which opinion, with their names thereunto, was also by his Majesty's command inrolled in the courts of chancery, king's bench, common pleas and exchequer, and likewise entered among the remembrances of the court of star-chamber, and according to the said agreement of the said justices and barons, judgment was given by the barons of exchequer, that the said John Hampden should be charged with the said sum so assessed on him; (7) and whereas some other actions and process depends, and have depended, in the said court of exchequer, and in some other courts against other persons, for the like kind of charge, grounded upon the said writs, commonly called ship-writs, all which writs and proceedings as aforesaid, were utterly against the law of the land.

II. Be it therefore declared and enacted by the King's most excellent majesty, and the Lords of Commons, in this

present parliament assembled, and by the authority of the same, that the said charge imposed upon the subject, for the providing and furnishing of ships, commonly called ship-money, and the said extra-judicial opinion of the said justices and barons, and the said writs, and every of them, and the said agreement or opinion of the greater part of the said justices and barons, and the said judgment given against the said John Hampden, were and are contrary to and against the laws and statutes of this realm, the right of property, the liberty of the subjects, former resolutions in parliament, and the petition of right made in the third year of the reign of his Majesty that now is.

III. And it is further declared and enacted by the authority aforesaid, that all and every the particular prayed or desired in the said petition of right, shall from henceforth be put in execution accordingly, and shall be firmly and strictly holden and observed, as in the same petition they are prayed and expressed; (2) and that all and every the records and remembrances of all and every the judgment, inrolments, entry and proceedings as aforesaid, and all and every the proceedings whatsoever, upon or by pretext or colour of any of the said writs, commonly called ship-writs, and all and every the dependents on any of them, shall be deemed and adjudged to all intent, constructions and purposes, to be utterly void and disannulled; and that all and every the said judgment, inrolments, entries, proceedings and dependents of what kind soever, shall be vacated and cancelled in such manner and form as records use to be that are vacated.

Thus ended the most important secular judicial contest in the history of the world; the greatest law suit any court, either of original jurisdiction or of last resort, ever had occasion to decide. It is not too much to say, that every American lawyer, jurist and legislator ought to be familiar with the report of the case, and be thoroughly imbued with the great principle of representative government which it inculcates and teaches. Long

before the case arose the House of Commons had become an integral part of parliament, and the conclusion finally reached in the House of Lords as the court of last resort in England, ratified and confirmed as it was by a solemn act passed by both houses and approved by Charles I. himself, anchored forever in the hearts of the men who speak the English language, the great principle of representative government that no taxes or charges can be levied against them without their consent or that of their immediate representatives.

To make the proceedings of parliament still more impressive, the commons presented articles of impeachment against the offending judges who were still on the bench and against Finch, who had been promoted by the King to the post of Lord Keeper of the Great Seal as the successor of Lord Coventry. Pending the adoption of the articles of impeachment against Finch, he requested to be and was heard by the Commons and made an able defense of himself, which went far to show that he had acted conscientiously and not as a mere time server; but the vote for his impeachment was nearly unanimous. Finch, after an interview with the King, fled across the sea in a vessel belonging to the Royal Navy and took refuge in Holland, where he remained in exile for a number of years, until conditions in England were favorable for his return. His estates in England were sequestered, but his wife was allowed to retain possession at a rental of £100 a year.

Justice Berkley was fined £20,000 to be paid in six weeks, but in consideration of immediate payment, it was reduced to £10,000. He was disqualified from holding any place of profit or honor in the state or commonwealth.

Baron Trevor was fined £6,000, which he immediately paid.

Baron Weston was not brought to trial, but by resolution of the Commons he was disqualified from acting as a judge.

The impeachment proceedings against Crawley, Davenport and Brampton, were dropped.

The Commons also impeached Thomas Wentworth, the Earl of Straford and the chief adviser of the King; and William Laud, archbishop of Canterbury. The first charge against the Earl of Straford was, that he "hath traitorously endeavored to subvert the fundamental laws and government of the realms of England and Ireland, and, instead thereof, to introduce an arbitrary and tyrannical government against law; which he hath declared by traitorous words, counsels and actions; and by giving his majesty advice by force of arms to compel his loyal subjects to submit thereunto."

The first charge against the Archbishop of Canterbury was, "that he hath traitorously endeavored to subvert the fundamental laws and government of the kingdom; and instead thereof to introduce an arbitrary and tyrannical government against law; and to that end hath wickedly and traitorously advised his majesty that he might at his own will and pleasure levy and take money of his subjects without their consent in Parliament. And this he affirmed was warrantable by the law of God."

The King was very anxious to save the life of the Earl of Straford, and a majority of the House of Lords were of the same mind, but the King acted with so little judgment, and the course of events was so strong, that al-

though the Commons abandoned the impeachment proceedings, and resorted to a bill of attainder, the Lords were constrained under the influence of a powerful argument by Oliver St. John to pass the bill, and it went to the King for his approval.

Charles Stuart was still King of England, and if he had been a courageous man, he would have withheld the royal assent, and saved the life of his most able and faithful adviser; but to save himself from mob violence he abandoned Straford to his fate, and appointed a commission to approve the bill, in his name, with the result that Straford's own brother signed his death warrant. May 12, 1641, Straford was executed on Tower Hill, in the presence of two hundred thousand persons, who assembled to witness what was regarded by the parliament party as an act of justice.

The articles of impeachment against the archbishop were presented to the House of Lords by a committee of the Commons consisting of Pym, Hampden and Maynard, February 26, 1641, but his trial did not commence until March 12, 1643. The Commons had difficulty, as in Straford's case, in convincing the Lords that the charges against the archbishop were within the statute of treasons, and resort was again had to a bill of attainder.

The civil war had been in progress for more than a year, and the breach between the King and parliament had become complete. The assent of the King was not regarded as necessary, as the two houses acted on their own authority. The force of precedent and custom impelled them to still enact laws in the name of the king with the consent of the Lords and Commons, the King in his politic capacity being regarded as assenting to

whatever was agreed upon by the two houses. January 10, 1644, the archbishop was executed on Tower Hill.

The skill of Oliver Cromwell as a disciplinarian and a general gave the parliamentary party success in the war, and the Commons took upon themselves the government of England. When the King was brought to London as a prisoner the Commons passed an act erecting "a high court of justice for the trying and judging of Charles Stuart, king of England." The court consisted of some one hundred and twenty-eight persons with Lord Fairfax and Oliver Cromwell at the head. The first charge against the King was that he had raised the standard of war against parliament.

"That the said Charles Stuart being admitted king of England and therein trusted with a limited power to govern by and according to the laws of the realm, and not otherwise; and by his trust, oath and office, being obliged to use the power committed to him, for the good and benefit of the people and the preservation of their rights and liberties; yet nevertheless out of wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will and to overthrow the rights and liberties of the people; yea, to take away and make void the foundations thereof, and of all redress and remedy of misgovernment, which by the fundamental constitutions of this kingdom were reserved on the people's behalf, in the right and power of frequent and successive parliaments or national meetings in council; he the said Charles Stuart, for the accomplishments of such his designs and for the protecting of himself and his adherents in his and their wicked practices to the same ends, hath traitorously and maliciously levied war against the present parliament and the people therein represented."

The King was tried in the Painted Chamber with all possible adherence to the ancient forms and ceremonies.

He was convicted and on the 30th day of January, 1649, in the open street before Whitehall, his head was severed from his body. The executioner held it up to show it to the people, saying "Behold the head of a traitor."

The execution of Charles I. has excited as much human interest as any other single event in the history of England. It has been highly praised or gently praised, and on the other hand mildly censured, or vehemently condemned, according to the views or bias of those who have written on it.

The offense of which Charles Stuart was guilty was not that of high treason as defined by the statutes of England, but that was the fault of the statutes, and not the lack of guilt on the part of the King of the crime of treason, if that offense is regarded as a natural one, founded in reason and justice, and is not wholly created by statute, so as to be included in crimes *mala prohibita*, as distinguished from those which are *mala in se*.

The statute of treasons, 25 Edward III. c. 2, gives us a clearer view of the extent to which the royal power and dignity of the kings of England have been exalted in English law, than any other statute. It makes the offense of high treason the highest and most heinous crime known to the law, and it is directed exclusively against acts concerning the king himself, the royal family, and his prerogatives of coining money and the administration of justice by his justices, and the keeping of his money by his treasurer.

The Latin words designating the offense of high treason as known to the Romans, *crimen laesae majestatis* are apt and strictly accurate.

Statute 25 Edward III. de proditionibus.

“Whereas divers opinions have been before this time, in what case treason shall be said, and in what not; the king at the request of the lords and of the commons hath made a declaration in the manner as hereafter followeth: that is to say, when a man doth compass or imagine the death of our lord the king, of my lady his queens, or of their eldest sonne and heirs: or if a man doe violate the king’s companion, or the king’s eldest daughter unmarried, or the wife of the king’s eldest sonne and heire: or if a man doe lavie warre against our lord the king in his realms, or be adherent to the king’s enemies in his realme, giving to them aid and comfort in the realme or elsewhere, and thereof be provally attainted of open deed by people of their condition. And if a man counterfeit the king’s money into his realme counterfeit to the money of England, as the money called Lusheburgh, or other like the said money England, knowing the money to be false, to merchandise or make payment, in deceit of our said lord the king and of his people, and is a man alay the chancellor, treasurer, or the king’s justices of the one bench or the other, justices in eire, or justices of assize, and all other justices assigned to heare and determine, being in their place doing their offices. And it is to be understood, that in the cases above rehearsed, it ought to be judged treason, which extend to our lord the king and his royal magestie; and of such treason the forfeiture of the excheats pertaineth to our lord the king, as well of the lands and tenements holden of others, as of himself.”

No wonder the Commons were not able to convince the Lords that the Earl of Straford and the Archbishop of Canterbury were guilty of treason, and the monarchial party in England has considered the execution of the King as without warrant in law and illegal; which was true if the kingship was the main and most essential part of the government; but it is now known and recognized that the Parliament was and is the supreme and sovereign power in the government of England, and that no

act could be more of the true nature of treason than that of attempting to destroy and overthrow parliament by raising the standard of war, and actually levying war against it.

From the standpoint of those who believe that representative government is the only government consistent with the natural rights of mankind, the conviction of the King was not an unjust verdict, but the sentence of death is censurable on two grounds: (1) the inhumanity of it, and (2) the bad policy of it. The only excuse for it, is that the death penalty had been for centuries, and for that matter still, is the recognized punishment for high crimes. The list of eminent persons in the service of the state, who had previously been executed in England on one charge or another is appalling. Those who were responsible for the execution of Charles I. were not able to see that Charles Stuart dead, would be a more dangerous enemy, than Charles Stuart deposed and imprisoned or exiled. His execution put sentiment, and fanaticism into the monarchical party, qualities in which it was growing weaker. To have extinguished the cavaliers it would have been necessary to have slaughtered the whole royal family and a good portion of the nobility, and it is doubtful whether even this would have been effective. From the standpoint of policy the execution of the King was a crime. It rallied the royal party and enabled it more than any other one thing to restore the monarchy. There was no immediate reaction which was beyond the power of the parliamentary party to suppress, but in a few years after Cromwell had passed away, it came with irresistible force.

Having got rid of the King, the parliamentary party undertook to establish a permanent government to take

the place of the Monarchy. Before the execution of Charles I. there were efforts to establish a firm and present peace, by instruments purporting to be agreements of the people, one draft of which was submitted to the council of the army October 26, 1647. A revised agreement of the people was submitted by the army to the House of Commons, January 20th, 1649. It was never adopted by that body.

February 13, 1649, an act was passed for the appointment of a Council of State of 41 members, over which parliament retained control.

Acts were passed by the House of Commons March 17 and 19, 1649, abolishing the office of King, and the House of Lords; and May 19, 1649, an act was passed declaring England to be a Commonwealth and Free State, to be governed "by the Supreme authority of this nation, the representatives of the people in Parliament, and by such as they shall appoint and constitute as officers and ministers under them for the good of the people, and that without any King or House of Lords."

In that way the Long Parliament (reduced to the House of Commons) retained control of the government.

This plan of government might have worked very well if the parliament had dissolved itself, and provided for a general election and a new and full parliament. This the Long Parliament refused and neglected to do, but proposed simply to order elections to fill the vacancies which had occurred, thus practically taking the position that the existing members held for life, and that the newly elected members would hold by the same tenure. The existing members would determine the election and qualifications of the new members, and in that way the

Long Parliament could perpetuate itself indefinitely. Representative government cannot exist without recurring elections at regular or irregular intervals, and the Long Parliament for a number of years before it was dissolved by force of arms, ceased to be a representative body. There was no way of getting rid of it except by revolutionary action. It had become a self-perpetuating oligarchy, one of the most odious forms of despotism, and it was due to the conservative efforts and action of Cromwell that it was permitted to exist as long as it did. Finally, even his patience was exhausted, and April 20, 1653, with a troop of soldiers he drove parliament from its hall, and dismissed its council of state. He performed a great service for the people of England, and the popular applause was as hearty as that which had greeted his great victories in the field.

The constitution of England was undone. The kingship, the House of Lords, and the House of Commons were gone. England was in the hands of the army with its commanding general, Oliver Cromwell, as military dictator. The work of destruction was an easy problem compared with that of reconstruction. The first definite steps in that direction taken by Cromwell was to issue writs, after the manner in which the kings of England summon the peers to the House of Lords, summoning 129 representatives for England, five for Ireland and six for Scotland, to meet at the council chamber at Whitehall July 4, 1653, to provide for the peace, safety and good government of the commonwealth. The persons summoned were selected by Cromwell, with the advice of the congregational churches in the counties and his council of officers. The writs were issued in the name of "Oliver Cromwell, captain general and commander-in-chief of all the armies and forces raised and to be raised

within this commonwealth." This parliament is known as the "Nominated Parliament." It contained no representatives elected by the people, and was more in the nature of a house of lords than a house of commons. It remained in existence until December 12, 1653, when it dissolved itself and surrendered its power into the hands of Cromwell. The council of officers had for some time been preparing a constitutional scheme, and proposed to confer on Cromwell the title of King. He declined the honor, not from a want of ambition, but for prudential reasons, and he was therefore given the title of Lord Protector. With this modification he approved the Instrument of Government which for the time being became the constitution of England.

The first article of the Instrument of Government vests the supreme legislative authority in one person with the title of Lord Protector and in the representatives of the people assembled in parliament. It is difficult to say whether this clause was inserted as a partial recognition of the monarchy and the king in parliament, or was the result of a hasty amendment, when Cromwell refused to accept the title of king. Whatever the reason for this provision may have been it was shorn of its apparent significance by the twenty-fourth article which withheld from the Lord Protector any negative power. All bills were required to be presented to him for his consent, but if his objections were not satisfactory to parliament it could so declare, and the bills he disapproved would become laws without his consent. His objections and arguments were simply advisory. On principle this is all the power or influence any executive ought to have over legislation.

The legislative power was left in the hands of the peo-

ple acting by their representatives. The provision "that the persons elected shall not have power to alter the government as it is hereby settled in one single person and a parliament," was construed by the first parliament of the Protectorate, as not comprehending the whole instrument, "but that the same doth only include what concerns the government of the commonwealth by a single person and successive parliaments." Acting upon that theory it framed a constitutional bill, which caused Cromwell to dissolve parliament at the very earliest date he was authorized to do so, January 22, 1655.

By the Instrument of Government, parliaments could not be dissolved until they had been in session for five months, and Cromwell construed that to mean lunar months of 28 days each.

The parliamentary constitutional scheme was an improvement on the instrument of government; it provided for amendments by parliament with the consent of the Lord Protector; that the council should be nominated by the Protector and approved by parliament; that war should be declared with the consent of parliament; that the parliament sitting, peace should be made with its consent; if not sitting, with the consent of the council under restrictions imposed by parliament; and that bills restraining, heresies, atheism, etc., should become law without the Protector's consent.

The last clause of the bill, that the militia ought not to be raised, formed, and made use of, but by common consent of the people assembled in parliament, etc., was not adopted by the parliament until January 20, 1655, and coupled with the other changes unsatisfactory to Cromwell, caused him to dissolve the parliament two days later.

The second parliament of the Protectorate did revise the Constitution of the Commonwealth by presenting to the Lord Protector the "Humble Petition and Advice" of May 25, 1657, and the addition thereto of June 26, 1657, both of which were approved by Cromwell.

Provision was made for an upper house to consist of members nominated by his Highness the Lord Protector and approved by the Commons.

The Lord Protector was authorized during his lifetime to appoint and declare the person who should immediately after his death succeed him in the government. He named his son, Richard Cromwell, as his successor, but there is no record of it.

Cromwell died September 3, 1658, and was succeeded by Richard, with the approval of the nation. The son had none of the sterling and rugged characteristics of his father, lacked experience, and was unable to govern England.

In May, 1660, the Monarchy in the person of Charles II. was restored.

A conspicuous feature in the rule of Oliver Cromwell was the vigor of his foreign policy. With the aid of Robert Blake, the great naval commander, he subdued the Dutch, swept the seas and obtained control of the Mediterranean.

He established that naval supremacy which has been retained by England to this day.

The abortive attempts to establish a written constitution are the forerunners of our American constitutions,

but they show that constitutions cannot be made to order, but must grow and develop and be in accord with the feelings, prejudices, hopes and aspirations of the people, and within their capacity.

The more we look into it the more we realize that our American constitutions were a development under American conditions of the best and most sacred precepts and principles of the English constitution.

Our American constitutions have not ceased to grow since they were first adopted. In addition to the first ten amendments of the Constitution of the United States, six other amendments have been made, and our state constitutions have been amended and revised from time to time.

The first ten amendments are to be regarded as a part of the original instrument, because they were adopted in pursuance of the recommendation of the Massachusetts convention, which had secured the ratification of the constitution by the requisite number of nine states.

The Eleventh Amendment was adopted 1794-1797, to secure to the states the same immunity from suits as is accorded to the sovereign authority everywhere. In the United States the people are sovereign and no suit can be brought against them or against their government, unless authorized by an act of Congress. No suit can be brought against a state, unless authorized by an act of the State Legislature, or it is a suit brought by another State.

The Twelfth Amendment adopted, 1803-1804, made a change in the method of electing the President and Vice-President. Under the original constitution the presiden-

tial electors of the several states voted for two persons, and the person receiving a majority and the highest vote was to be the President, and the next highest, Vice-President, and in case no person had a majority or there was a tie vote the House of Representatives, voting by states, elected the President and the Senate elected the Vice-President. The consequences were that in the Presidential elections of 1796, the two leading candidates, John Adams, representing one party, and Thomas Jefferson, the other party, were elected President and Vice-President.

In 1800 Thomas Jefferson and Aaron Burr, each received a majority vote of 73. The House of Representatives elected Jefferson president, and Burr, under the constitution, became vice-president.

This experience and the controversies incident to the elections of 1796 and 1800, led to the adoption of the Twelfth Amendment, providing for the election of the President and Vice-President separately.

The Thirteenth Amendment adopted in 1865 abolished slavery.

The Fourteenth Amendment, adopted 1866-1868, makes all persons born or naturalized in the United States and subject to the jurisdiction thereof citizens of the United States and of the State wherein they reside.

It further provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment of 1869-1870 secured the right to vote to the freed slaves of the south by the general provision :

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.”

The Sixteenth Amendment adopted in 1911-1913 authorizes Congress to levy taxes on incomes from whatever source derived, without apportionment among the states according to population, a power Congress did not possess under the original constitution as construed by the Supreme Court of the United States.

The Seventeenth Amendment still more recently adopted takes from state legislatures the power to choose United States Senators, and places it in the hands of the electors of the state.

Written constitutions can grow and improve as well as unwritten constitutions; but great fundamental principles of law, gain strength by age. The law of the land clause of Magna Carta, now rendered “due process of law” found its final expression in this country, in the Fourteenth Amendment as a federal limitation on the states.

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referred to in this lecture and many others of a constitutional nature. In the study of constitutional law and history we are not concerned with the religious controversies of the period under consideration; but are interested in studying the phenomena which helped to establish the doctrine of representative taxation and legislation both in England and America, and which prevails, with but few exceptions, wherever the English language is the language of the people.

For an able and dispassionate view of Cromwell I refer to Gardiner's "Cromwell's Place in History."

X.

THE LEGISLATIVE.

(Continued.)

Reigns of Chas. II. and Jas. II.—Test Acts of 20 Chas. II., c. 2; 30 Chas. II., c. 1; 3 Jas. I., c. 4; 1 Eliz. Stat. I, c. 2; 1 William and Mary, c. 8—Jas. II. continues customs duties by proclamation; establishes an Ecclesiastical Commission—Case of Godden vs. Hales, 11 St. Tr. 1165—Declaration of Indulgence—Case of the Seven Bishops—Prince of Orange takes possession of London—Convention Parliament of 1688-9—Bill of Rights—Provisions of American constitutions securing religious liberty—Constantine's Edict of Tolerance of A. D. 313.

The reaction from the "Great Rebellion" and Cromwell's "Commonwealth of England," restored the monarchy in 1660 in the person of Charles II, whose reign continued until his death in 1685. He was succeeded by his brother, the Duke of York, who became King of England as James II, but in three years he was forced, or rather permitted, to flee the Kingdom; crossing the Thames he dropped the Great Seal of England into the river, and it was held that he had abdicated his throne; but as a matter of fact he was deposed and the crown conferred on William, Prince of Orange, and his wife, Mary.

A great religious controversy was at the bottom of the English revolution of 1688, usually referred to by English historians as the "Glorious Revolution;" but as students of constitutional history we are not concerned with the merits of that controversy, which we will leave to the theologians and doctors of divinity.

We are not studying the controversies or the distinc-

tions and differences between Catholics and Protestants, or between the Church of England and those who conformed to its creed and forms of worship, and the Catholics, the Puritans, the Independents, the Presbyterians and other non-conformists and dissenters.

We are only interested in knowing what came out of the struggle for supremacy, and what effect it had on the English constitution and on American constitutions.

In 1673 a statute, 25 Charles II, C. 2, was enacted, known as the Test Act.

It either did not apply to or was not observed by members of Parliament or the sworn servants of the King or Queen; but in 1677, 30 *Charles II*, C. 1, it was extended to them, an exception being made of the Duke of York and of eighteen servants of the Queen.

The test act required all officials, civil, military or naval, to take and subscribed the oaths of supremacy and allegiance prescribed by the act of 1605, 3 *James I*, C. 4, and also an additional declaration as follows:

"I, A. B., do declare that I do believe that there is not any transubstantiation in the sacrament of the Lord's supper, or in the elements of bread and wine, at or after the consecration thereof by any person whatsoever."

The statute, 3 James 1, C. 4, was based upon the acts of supremacy and conformity of 1558, 1 Eliz. S. 1, C. 2; the first of which required all bishops, ministers, and other ecclesiastical persons and all temporal judges, justices, mayors, and all other lay officers receiving fees or wages from the crown to accept and take an oath that the Queen was the supreme governor of the realm "as well in spiritual or ecclesiastical things or causes, as temporal," etc.

The act of conformity was designed to compel all the inhabitants of the realm to accept the Church of England, with its episcopacy, liturgy and book of common prayer, as the only true and holy church. It was directed not only against Catholics, but also against Protestants and all others who did not embrace or conform to the Established Church.

All these statutes and others of a like nature were terrible engines of religious intolerance and a disgrace to any country or any age; but they were passed by both houses of parliament and respectively approved by Elizabeth, James I. and Charles II., and being acts of parliament, they were the law until repealed by I William and Mary, C. 8 (1688) and slightly more moderate oaths prescribed.

The growth of toleration in England was very slow; it was first extended to Dissenters who believed in the Trinity; then to Catholics; then to Unitarians and all Christians; and after 1858 either house of parliament was permitted to admit Jews to membership; and in 1866 a new form of oath was prescribed, unobjectionable to the Hebrews.

Although solicited to do so by Charles II. the Duke of York refused to take the test oath, and when he became King he undertook to get rid of the act by an exercise of the royal prerogative of dispensing with or suspending acts of parliament, a power it was claimed the Kings of England still possessed. The immediate object he sought was commendable, but the means employed by him were disastrous not only to his cause but to himself.

One of the first things he did was to issue a proclamation continuing the custom duties imposed by an act which

expired at the death of Charles II. Tonnage and poundage were only granted to the Kings of England for life, and James II. did not propose to depend upon parliament for any such grant.

Another thing he did was to issue a commission creating an Ecclesiastical Commission like the High Commission Court of Elizabeth, in violation of an act of the Long Parliament which abolished the court of Elizabeth and provided that no new court with like power, jurisdiction and authority should be thereafter erected.

On the same day (July 5, 1641), the Long Parliament abolished the Court of Star Chamber.

Following the course pursued by Charles I. in the matter of ship writs, James II. privately obtained the opinion of the judges that the dispensing power was a prerogative of the King. A collusive action was then brought and a formal decision and judgment obtained, establishing that doctrine. The case is that of

GODDEN VS. HALES.

11 State Trials, 1165.

7 Hargraves St. Trials, 611.

Sir Edward Hales was lieutenant of the tower and had been admitted to the office of colonel of a regiment of foot. He was a Roman Catholic and had neglected to take the oaths of supremacy and allegiance and he had not received the sacrament, as required by the Test Act. He was indicted and found guilty and Godden, his servant, was induced to bring an action against him in the King's Bench to recover the forfeit £500 imposed by that act.

Lord Chief Justice Herbert, delivering the opinion and

judgment of the court, said that all of the twelve judges had been consulted, with this result:

“We were satisfied in our judgments before, and having the concurrence of eleven out of twelve, we think we may very well declare the opinion of the court to be, that the King may dispense in this case. And the Judges go upon the grounds:

1. That the Kings of England are Sovereign Princes.
2. That the laws of England are the King's laws.
3. That therefore 'tis an inseparable prerogative in the King of England to dispense with penal laws in a particular case, and upon particular necessary reasons.
4. That those reasons and those necessities the King himself is the sole judge: And then, which is consequent upon all,
5. That this is not a trust invested in or granted to the King by the People, but the ancient remains of the sovereign power and prerogative of the Kings of England; which never yet was taken from them, nor can be.

“And therefore such a dispensation appearing upon the record to come, time enough to save him from the forfeiture, judgment ought to be given for the defendant.”

The King had dismissed some of the judges and put others on the bench secretly favorable to him.

The decision “made a great noise;” it was severely criticised; and the Chief Justice published a lengthy vindication of himself.

Having obtained a favorable decision from the judges of the three great courts of England James II. did not hesitate to exercise the power they held was legally his. April 4, 1687, he issued his Declaration for Liberty of Conscience, in which he not only suspended the test act, but also the conformity act of 1558, 1 Eliz., C. 2, which

required all the clergymen and inhabitants of England to accept the creed and faith, to use the book of common prayer, to administer and receive the sacraments, and observe the rites and ceremonies of the Church of England, and to attend services on Sundays and holy days.

The following are extracts from the Declaration of Indulgence:

“We do likewise declare, that it is Our Royal Will and Pleasure, that from thence the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the sacrament, or for any other non-conformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended and the further execution of the said penal laws and every of them is hereby suspended.

“We do further declare that it is Our Royal Will and Pleasure, that the oaths commonly called the oaths of supremacy and allegiance, and also the several tests and declarations mentioned in the acts of parliament made in the twenty-fifth and thirtieth years of our late royal brother King Charles the Second, shall not at any time hereafter be required to be taken, declared or subscribed by any person or persons whatsoever, who is or shall be employed by the government.”

Not satisfied with what he had done, the King in council, May 4, 1688, issued an order that his declaration of indulgence be read at the usual time of divine service, on the 20th and 27th of May, in all churches and chapels within the cities of London and Westminster, and ten miles thereabout, and on the 3rd and 10th of June in all other churches and chapels throughout the kingdom, and the Right Reverend the Bishops were required to send and distribute the Declaration throughout their respective dioceses.

The best abbreviated account of the subsequent proceedings can be found in "Leading cases in (English) Constitutional Law," by Ernest C. Thomas, published in 1885 by Stevens & Haynes, London.

CASE OF THE SEVEN BISHOPS.

4 Hargraves State Trials, 303.

12 Howels State Trials, 183.

"Six of the bishops met at the archbishop's palace at Lambeth and drew a petition that the King would not insist upon their distributing and reading the Declaration, 'especially because that Declaration is founded upon such a dispensing power, as hath been often declared illegal in parliament, and particularly in the years 1662 and 1672, and the beginning of your Majesty's reign.' This petition six of them presented to the King in person. Shortly afterwards they were summoned to appear before the council to answer 'matters of misdemeanour,' and were told that a criminal information for libel would be exhibited against them in the King's Bench, and were called upon to enter into their recognisances to appear. This they refused to do, insisting upon their privileges as peers; and were accordingly committed to the Tower.

"On the 29th June the case came on, when they were charged with a conspiracy to diminish the royal authority, and in prosecution of this conspiracy with the writing and publishing of a certain 'false, feigned', malicious, pernicious and seditious libel.'

"After much time wasted in attempts to prove the handwritings of the bishops, it was only done by calling Blathwayt, a clerk of the Privy Council, who had heard the bishops own their signatures to the King.

"But the libel was charged to have been written in Middlesex, and this could not be proved—as it had in fact been written at Lambeth, in Surrey. Accordingly Lord Sunderland was brought to prove the presentation to the King.

“The document was asserted by the prosecution to be a libel, because it urged that the Declaration was based upon an illegal power.

“The counsel for the defense argued:

“1. That the petition was a perfectly innocent petition, presented by proper persons in a proper manner. The bishops are intrusted with the general care of the church, and also by stat. 1 Eliz., c. 2, with the carrying out of this Act—the Act of Uniformity; and had a right to petition in this case.

“2. As to their questioning of the dispensing power, no such power exists. The declarations of parliament sufficiently show this. In 1662, when King Charles wished to extend an indulgence to the Dissenters, it was asserted by Parliament that laws of uniformity ‘could not be dispensed with but by act of parliament.’ In 1672, when the King had actually issued such a Declaration, upon the remonstrance of Parliament he caused the said Declaration to be canceled, and promised that it should not become a precedent. In 1685, when the King announced that he had certain officers in his army ‘not qualified according to the late tests for their employments,’ Parliament passed an Act of Indemnity that ‘the continuance of them in their employments may not be taken to be dispensing with that law without act of parliament.’ Until the last King’s time, the power of dispensing ‘never was pretended,’ on which point Somers, as junior counsel for the defense, quoted ‘the great case of Thomas vs. Sorrel,’ to show that it was there agreed by all that there could be no suspension of an act of parliament but by the legislative power.

“The two questions left to the jury were: 1. Was the publication proved?—a mere question of fact. 2. Was the petition libelous? Wright, L. C. J., and Allybone, J., directed them that it was; Holloway and Powell, J. J., thought that it was not.

“The jury having retired and been locked up all night, the next morning delivered a verdict of Not Guilty.”

The 10th of June, 1688, was a fatal day for James II.

On that day the prosecution of the Seven Bishops was commenced by their commitment to the Tower, and to the custody of the same Sir Edward Hales; and on that day a Prince of Wales was born, as the heir apparent to the crown, displacing Mary, the sister of the King, who was the wife of the Prince of Orange, and who was himself the son of Mary Stuart, a daughter of James I.

On the very day the jury acquitted the Bishops seven of the Great Lords of England secretly sent to the Prince of Orange an invitation to come to England with an army and take possession of the throne and the kingdom.

Less than six months afterwards, December 18, 1688, the Prince and his general, Schomberg, took possession of London, and James II., in the royal barge, attended by eight or ten boats loaded with Dutch soldiers passed down the Thames.

A convention parliament in February 1688-1689 adopted a Declaration of Rights and declared William and Mary King and Queen of England. The following December a parliament, regularly summoned by the King, enacted the Declaration of Rights into law as the Bill of Rights, from which were borrowed a number of the provisions of American constitutions, making it necessary for students of the constitutional law of the United States to study that instrument and to understand the historical events of which it was the outcome.

It is immaterial to us what the quarrel was about, but it is important to realize that the controversy resolved itself into a struggle between the King, with his prerogatives of absolute power, and representative-parliamentary government, and that representative taxation and legislation won.

BILL OF RIGHTS.

(1689)

I Will. & Mar. Sess. 2, c. 2.

(5 Parl. His., 483.)

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did, upon the thirteenth day of February, in the year of our Lord one thousand six hundred eighty-eight, present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by said Lords and Commons, in the words following, viz:

Whereas the late King James II., by the assistance of diverse evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom:

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbling petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants,

to be disarmed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by diverse other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James II. having abdicated the government, and the throne being thereby vacant, his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and diverse principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws and liberties might not again be in danger of being

subverted; upon which letters elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters, and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done), for the vindicating and asserting their ancient rights and liberties declare:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning, is illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against the law.

7. That the subjects which are Protestant may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceed-

ings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights and liberties;

11. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster, do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France and Ireland, and the dominion thereunto belonging, to hold the Crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that sole and full exercise of the regal power be only in, and executed by, the Prince of Orange, in

the names of the said Prince and Princess during their joint lives; and after their deceases, the said Crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

I, A. B., do sincerely promise and swear, that I will be faithful and bear true allegiance to their Majesties King William and Queen Mary. So help me God.

I, A. B., do swear, That I do from my heart, abhor, detest and abjure as impious and heretical, the damnable doctrine and position, that Princes excommunicated by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, of any other whatsoever. And I do declare, that no foreign prince, person, prelate, state or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual, within this realm. So help me God.

IV. Upon which their said Majesties did accept the Crown and royal dignity of the kingdoms of England, France and Ireland and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, that the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesty's royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger

again of being subverted; to which the said Lords Spiritual and Temporal, and Commons did agree and proceed to act accordingly.

VI. Now in pursuance of the premises, the said Lords Spiritual and Temporal, and Commons, in parliament assembled, for the ratifying, confirming and establishing the said declaration, and the articles, clauses, matters and things therein contained, by the force of a law made in due form by authority of parliament, do pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and undubitable rights and liberties of the people of this kingdom, and shall be so esteemed, allowed, adjudged, deemed and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons seriously considering how it hath pleased Almighty God, in his marvelous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts, think, and do hereby recognize, acknowledge, and declare, that King James II. having abdicated the government, and their Majesties having accepted the Crown and royal dignity aforesaid, their said Majesties did become, were, and of right ought to be, by the laws of this realm, our sovereign liege Lord and Lady, King and Queen of England, France and Ireland and the dominions thereunto belonging, in and to whose princely persons the royal State, Crown and dignity of the same realms, with all honours, styles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully and entirely invested and incorporated, united and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the Crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquility, and safety of this nation doth under God, wholly consist and depend, the said Lords Spiritual and Temporal, and Commons, do beseech their Majesties that it may be enacted, established and declared, that the crown and regal government of the said kingdoms and dominions with all and singular the premises thereunto belonging and appertaining shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them. And that the entire, perfect and full exercise of the regal power and government be only in, and executed by, his Majesty, in the names of both of their Majesties during their joint lives; and after their deceases the said Crown and premises shall be and remain to the heirs of the body of her Majesty; and for default of such issue, to her Royal Highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of his said Majesty; and thereunto the said Lords Spiritual and Temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterities forever, and do faithfully promise, that they will stand to, maintain and defend their said Majesties, and also the limitation and succession of the Crown herein specified and contained, to the utmost of their power, with their lives and estate, against all persons whatsoever that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom, to be governed by a Popish prince, or by any king or queen marrying a Papist, the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be forever in-

capable to inherit, possess or enjoy the Crown and government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance; and the said Crown and government shall from time to time descend to, and be enjoyed by such person or persons being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing or marrying as aforesaid, were naturally dead.

X. And that every King and Queen of this realm, who at any time hereafter shall come to and succeed in the Imperial Crown of this kingdom, shall, on the first day of the meeting of the first parliament, met after his or her coming to the Crown, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen), make, subscribe and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King Charles II., entitled "An Act for the more effectual preserving the King's person and government by disabling Papists from sitting in either House of Parliament." But if it shall happen, that such King or Queen, upon his or her succession to the Crown of this realm, shall be under the age of twelve years, then every such king or queen shall make, subscribe and audibly repeat the said declaration at his or her coronation, or the first day of meeting of the first parliament as aforesaid, which shall first happen after such King and Queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present parliament, and shall stand, remain, and be the law of this realm forever; and the same are by their said

Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in parliament assembled, and by the authority of the same, declared, enacted and established accordingly.

XII. And be it further declared and enacted by the authority aforesaid, That from and after this present session of parliament, no dispensation by non obstante of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of, in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of parliament.

XIII. Provided that no charter, or grant, or pardon granted before the three-and-twentieth day of October, in the year of our Lord one thousand six hundred eighty-nine, shall be any ways impeached or invalidated by this act, but that the same shall be and remain of the same force and effect in law, and no other, than if this act had never been made.

(Statutes of the Realm, vi. 142-145).

Catholics cannot read the disqualifications and restrictions placed on those of their faith for centuries by the laws of England, and as far as the royal family is concerned continued to this day, without entertaining sentiments of resentment; and no lover of the right to believe and worship according to the dictates of one's own conscience can review the history of these religious controversies without feelings of supreme disgust.

Happily the Catholics of Maryland, the Puritans of New England, the English Church men of Virginia, and the Dutchmen of New York, when they came to frame and ratify the constitution of the United States absolutely divorced the church and state, and we live in a country of both religious and civil freedom.

To this policy of toleration we are indebted for some of the provisions of our American constitutions:

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof,” etc.

The oath of the President is simply this and nothing more:

“I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States.”

The constitution of Michigan prescribes a similar oath with this significant addition, borrowed from New York:

“And no other oath, declaration or test shall be required as a qualification for any office or public trust.”

The ordinance for the government of the territory northwest of the River Ohio, of which Michigan was a part, says:

“No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in said territory.”

The constitution of Michigan contains this provision:

“Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.

No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."

This constitutional provision was not designed to prevent and does not prevent any religious denomination from establishing and maintaining schools, seminaries and colleges wherein both religious and secular instruction may be given, and of which the University of Detroit is a conspicuous and noble example; but it does show the absolute necessity of keeping religion out of the public schools and colleges.

It took the people who speak the English language a long time to learn that the surest way of promoting the growth of a religious sect or denomination is to persecute them, imprison them, and burn them; and that a union of the church and state is disastrous to both, for it is certain that at times the state will use the church to oppress its enemies, and at other times the church will use the state as its weapon of warfare.

As Cardinal Gibbons has expressed it:

"A civil ruler dabbling in religion is as reprehensible as a clergyman dabbling in politics."

It must not be assumed that the religious toleration established in America by the Constitution of the United States, and subsequently accepted by the constitutions of the several states, was a modern invention. The early Christians of Rome, those who accepted the teachings of

St. Peter and St. Paul, suffered great persecution and were compelled to worship in the catacombs underlying the city; but in 313, just 1600 years ago, the Emperor Constantine, with the concurrence of Licinius, his colleague, issued an edict of religious tolerance that marks an epoch in the history of the world.

CONSTANTINE'S EDICT OF TOLERANCE.

“In a preamble to the Edict the reasons are set forth which led to its publication. These are: (1) the conviction which had grown in the minds of the Emperors that ‘each individual should have the right to perform his religious duties according to his own choice,’ and (2) to remedy the defect in previous Edicts which imposed conditions at variance with that choice. Then follow the clauses which gave the Edict its peculiar character and great importance. ‘When we, Constantine and Licinius, came under favorable auspices to Milan and took under consideration everything which pertained to the common weal and prosperity, we resolved among other things, or rather first of all, to make such decrees as seemed in many respects for the benefit of every one; namely, such as should preserve reverence and piety towards the Deity. We resolved, that is, to grant both to the Christians and to all men freedom to follow the religion which they choose, that the Divine Power in Heaven may be propitious to us and to all that live under our government. We have, therefore, determined with sound and upright purpose that liberty is to be denied to no one to choose and to follow the religious observances of the Christians, but that to each one freedom is to be given to devote his mind to that religion which he may think adapted to himself, in order that the Deity may exhibit to us in all things His accustomed care and favor. It was fitting that we should write that this is our pleasure, that these conditions being entirely left out which were contained in our former letter concerning the Christians (the Edict of Galerius bore the names

of both Constantine and Licinius), everything that seemed very severe and foreign to our mildness may be annulled, and that now everyone who has the desire to observe the religion of the Christians may do so without molestation. Since freedom and full liberty is granted to the Christians to observe their own religion, liberty is granted to others also who may wish to follow their own observances; it being clearly in accordance with the tranquility of our times, that each one should have the liberty of choosing and worshiping whatever Deity he pleases. This has been done by us in order that we might not seem in any way to discriminate against any rank or religion.' " (See Article by Patrick J. Healy in Catholic University Bulletin, January, 1913.)

His Holiness Pius X gave directions for a suitable commemoration in Italy of the sixteen-hundredth anniversary of the promulgation of the edict of toleration; and here in Michigan, Catholics, Protestants, Hebrews and all other sects and denominations can join in the rejoicing, for both under the Federal and the State constitution Constantine's edict is constitutional law in this state.

Bibliography. "History of the English People," by John Richard Green, in 4 vols., is a valuable work. An edition was published by Harper & Brothers in 1903. The third and fourth volumes embrace the period from the Restoration to the Accession of William and Mary and the Bill of Rights.

"History of England from the Accession of James II,." by Thomas Babington Macaulay, in 4 volumes, is the most popular English history ever written. It brought its author great fame and a fortune. Macaulay was a Whig, and a strong partisan. He wrote more as an advocate than a philosopher; but he was a great writer. His work should be read having in mind the saying attributed to Lord Melbourne: "I wish I were as sure of any one thing as Macaulay is of everything."

The first two volumes appeared in 1848, and the next two in 1855. A five-volume edition with a Memoir was published by D. Appleton & Co., of New York, in 1878.

XI.

THE LEGISLATIVE.

(Continued.)

The legislative in the English colonies in America—The Virginia Company of London—The Virginia Company of Plymouth in England—Colony of Massachusetts Bay—Province of Carolina—Grant of New Hampshire—Charter of Rhode Island—Charter of Connecticut—Grant of Chas. II. to Duke of York—Grant of New Jersey by Duke of York—Forfeiture of Charter of Massachusetts Bay and grant of new Charter by William and Mary—Grant of Pennsylvania to William Penn—Grant of Delaware by William Penn—Charter of Georgia—The case of the Island of Grenada—The First Constitution of Virginia—Sir Edwin Sandys—Compact on the Mayflower.

The Revolution of 1688 and the Bill of Rights secured to the People of England the right to representative taxation and legislation and established the supremacy of the parliament, but left the English colonies in America subject to the sovereign powers of the Crown.

One of the prerogatives of the kings of England was the power to grant charters of incorporation. These charters had one merit; they were not subject to be recalled or revoked at the will of the King, but could only be forfeited for cause by *quo warranto* in the King's Bench or by proceedings in the High Court of Chancery.

The King could also govern a colony as a royal province through a governor appointed and commissioned by him; and he could also make grants to a proprietor and vest in him the government of the colony.

The following summary of the governments established by the Crown in America shows the disposition made of the legislative power in each colony :

The first patent or charter for the English colonization of America was granted to Sir Humphrey Gilbert, his heirs and assigns by Queen Elizabeth in 1578. It gave him power to enact laws: "So always as the said statutes, laws and ordinances may be as neere as conveniently may be agreeable to the forme of the lawes, statutes, government or pollicie of England, and also so as they be not against the true Christian faith nowe professed in the Church of England, nor in any wise withdrawe any of the subjects or people of those lands or places from the allegiance of us our heirs or successors as their immediate sovereigns under God."

No permanent settlement was made under this patent.

The next charter was granted to Sir Walter Raleigh by Queen Elizabeth in 1584. There were five voyages under it but no permanent settlement resulted. The above limitation on the powers of government granted Raleigh, was inserted word for word in his charter.

The next charter was granted by James I. in 1606, and is known as the first charter of Virginia. It provided for two colonies, the first commonly called the Virginia Company of London, and the second the Virginia Company of Plymouth in England. Each colony was to be managed by a council resident in England, but "according to such laws, ordinances, and instructions as shall be in that behalf given and signed with our hand or sign manual, and pass under the privy seal of our realm of England."

The second charter of Virginia granted by James I. in

1609, conferred authority on the council of the first or London Company to establish "orders, ordinances, constitutions, directions and instructions:" "so always as the said statutes, ordinances and proceedings as conveniently may be, be agreeable to the laws, statutes, government and policy of this our realm of England."

This limitation is repeated in the third Virginia charter of 1612.

In 1620 the Virginia company of Plymouth received a new charter for the colonization of New England in America. The management of the company was confided to a council of forty persons, established at Plymouth in England, with power to make orders, laws, directions, instructions, forms and ceremonies of government and magistracy, "so always as the same be not contrary to the laws and statutes of this our realm of England."

The Plymouth Company in 1621 granted the province of Maine to Sir Ferdinando Gorges and Capt. John Mason, who agreed that they would establish such government "as shall be agreeable, as neare as may be to the laws and customs of the realm of England." This grant was confirmed by Charles I. in 1639.

The Plymouth Company in 1629 granted a subcharter to William Bradford and his associates for the colony of New Plymouth. Bradford and his heirs, assigns and associates or people there inhabiting were given liberty from time to time "to frame and make orders, ordinances and constitutions," "provided that the said lawes and orders be not repugnant to the lawes of England, or the forme of government by the said presedente and council (of the Plymouth company) hereafter to be established."

Charles I. in 1629, (with the consent of the Plymouth

Company expressed by deed), granted to Sir Henry Rosewell and others and their associates and successors, a charter for the colony of Massachusetts Bay. The government was vested in a governor and eighteen assistants, and in four general assemblies of the company in each year, with power to make laws and ordinances "as to them from tyme to tyme shall be thought meete, so as such lawes and ordinances be not contrarie or repugnant to the laws and statutes of this our realm of England."

A patent granted by Charles I. in 1629 to Sir Robert Heath for the province of Carolina, conferred authority on Sir Robert, his heirs and assigns, with the counsel, consent and approbation of the freeholders of the province or of the major part of them, to make laws, "Yet so that the aforesaid lawes and ordinances be consonant to reason, and not repugnant or contrary, but (as conveniently as may be done) consonant to the lawes, statutes, customs and rights of our realm of England."

Another documentary event in 1629 was the grant of New Hampshire by the Plymouth Company to Capt. John Mason. He agreed for himself, his heirs and assigns that he would establish such government therein "as shall be agreeable as near as may be to ye laws and customs of ye realm of England."

The charter of Maryland, granted to Lord Baltimore in 1632, conferred power to make laws, "so nevertheless that the laws aforesaid be consonant to reason and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs and rights of this our kingdom of England."

A royal commission in England in 1643 made a grant to the inhabitants of Providence Plantations in the Nar-

ragansett Bay in New England, authorizing them "to make and ordain civil laws and constitutions, and inflict such punishment upon transgressors and for execution thereof, so to place and displace officers of justice, as they or the greater part of them shall by free consent agree unto; provided nevertheless that the said laws, constitutions and punishments for the civil government of said plantations, be conformable to the laws of England so far as the nature and constitution of the place will admit."

The same limitation is found in the charter granted in 1663 by Charles II. to Rhode Island and Providence Plantations, which charter was the constitution of the state of Rhode Island until 1842.

Connecticut did not get a charter until 1662, when the colonies of Hartford and New Haven were united and given power "to make, ordain and establish all manner of wholesome and reasonable laws, statutes, ordinances, directions and constitutions not contrary to the laws of this realm of England."

The patent granted to Sir Robert Heath for the province of Carolina was declared void in 1663 because the purpose for which it had been granted had never been fulfilled.

Thereupon a charter was granted to Lord Clarendon and others, who were authorized with the consent of the freemen of the province to make laws: "Provided nevertheless that the said laws be consonant to reason and as near as may be conveniently, agreeable to the laws, and customs of this our kingdom of England."

The Duke of York equipped an armed expedition and took possession of the Dutch colony of New Amsterdam in

1664. Charles II. then granted to the Duke the territory known as the province of Maine, and the territory between the Connecticut river and Delaware Bay, (New York and New Jersey), and gave him, his heirs, deputys, agents, commissioners and assigns, authority to establish lawes, ordinances, directions and instruments, "so always as the said statutes, ordinances and proceedings be not contrary to but as neare as conveniently may be agreeable to the lawes, statutes and government of this our realm of England, and saving and reserving to us our heirs and successors ye receiving hearing and determining of the appeal and appeals of all or any person, or persons, of, in, or belonging to ye territories or islands aforesaid in or touching any judgment or sentence to be there made or given."

In 1673 a Dutch fleet recaptured New York and held it until it was restored to England by treaty in 1674, when the grant to the Duke of York was renewed.

The Duke of York in 1664 granted New Jersey to Lord Berkeley and Sir George Cartaret as lords proprietors, and they made a concession and agreement to and with all and every the adventurers and all such as should settle or plant there. This instrument is more like a constitution than any colonial grant theretofore made. The government was vested in a governor, a council, and a body of representatives, all of which were to constitute the general assembly with power to make lawes "consonant to reason and as near as may be conveniently, to the laws and customs of his majesty's kingdom of England."

"And by act as aforesaid to lay equal taxes and assessments, equally to raise moneys or goods upon all lands (excepting the lands of us Lords Proprietors before settling) or persons within the several precincts, hundreds, parishes, manors," etc.

The power of taxation was also limited by the following significant provision:

“They are not to impose, or suffer to be imposed any tax, custom, subsidy, tallage, assessment or any other duty whatsoever upon any colour or pretense upon the said Province and inhabitants other than what shall be imposed by the authority and consent of the general assembly and then only in manner aforesaid.”

In 1665 the Lords Proprietors of the province of Carolina executed an instrument of “concessions and agreements” with the adventurers and all that should plant there, containing the same provisions in regard to taxation as those in the New Jersey grant of the Duke of York.

The Carolina charter of 1663, was somewhat enlarged and confirmed by a charter granted by Charles II. in 1665.

The famous charter of the Province of Pennsylvania granted to William Penn in 1681 authorized him, his heirs and his or their deputies and lieutenants with the consent of the freemen of the country or of their delegates and deputies, to ordain, make and enact laws: “Provided nevertheless that the said laws bee consonant to reason and bee not repugnant or contrarie, but as neare as conveniently may bee agreeable to the laws and statutes and rights of this our Kingdome of England; and saving and reserving to us our heirs and successors the receiving heareing and determining of the appeale and appeales of all or any person or persons, of, in, or belonging to the territories aforesaid, or touching any judgment to be there made or given.”

“Our further will and pleasure is that a transcript or duplicate of all lawes, which shall be soe as aforesaid made, and published within the said Province shall within five years after the making thereof be transmitted and delivered to the Privy Council, for the time being, of us, our heirs and successors: And if any of the said lawes within the space of six months after that they shall be soe transmitted and delivered, bee declared by us, our heires or successors, in our or their Privy Councell, inconsistent with the sovereignty or lawful prerogative of us, our heirs or successors, or contrary to the faith and allegiance due to the legal government of this realme from the said William Penn or his heirs or of the planters and inhabitants of the said province, and that thereupon any of the said lawes shall be adjudged and declared to be void by us our heires or successors, under our or their privy seale, that then and from thence forth, such lawes concerning which such judgment and declaration shall be made shall become void: otherwise the said lawes so transmitted shall remaine and stand in full force according to the true intent and meaning thereof.”

The charter of Massachusetts Bay was forfeited by the high court of chancery of England in 1684. William and Mary in 1691 granted a new charter consolidating the Bay and Plymouth colonies, and Maine and Nova Scotia, under the name of the province of Massachusetts Bay. The government was vested in a governor and council, and the representatives of the freeholders and inhabitants, assembled as a general court or assembly with power to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances “so as the same be not repugnant or contrary to the laws of this our realm of England.”

All laws, statutes and ordinances were required to be

transmitted to England, and if within three years they were disallowed and rejected by the Privy Council they were to become utterly void and of no effect.

Delaware was a part of the territory granted to William Penn, and in 1701 he granted a charter for the separate government of the counties subsequently known as Delaware. An assembly consisting of four representatives from each county was authorized to pass laws, and to "have all other powers and privileges of an assembly according to the rights of free born subjects of England and as is usual in any of the King's plantations in America."

Georgia was a part of Carolina, but in 1732 George II. chartered a corporation to be known as the "Trustees for establishing the colony of Georgia in America." Power was given to form and prepare laws, statutes and ordinances fit and necessary for and concerning the government of the said colony, and not repugnant to the laws and statutes of England, the same to be presented to the Privy Council for approbation or disallowance, and if approved from thence forth to be in full force and effect.

The thirteen English colonies in America had three different kinds of government: charter, proprietary, and provincial.

The charter of Virginia was cancelled in 1621, and thereafter it was a royal province.

New Jersey and the Carolinas once proprietary became provincial before the revolution. By that time there were only three charter governments left: Massachusetts, Rhode Island and Connecticut. The proprietary governments were Maryland, Pennsylvania and Delaware.

The royal or provincial colonies were New Hampshire, New York, New Jersey, Virginia, North and South Carolina, and Georgia.

The charter governments were democratic, as the colonists selected their governor, council and assembly, except that in Massachusetts the governor was appointed by the King.

The proprietary governments were feudal principalities, almost palatinates, or subkingdoms of the kingdom of England, as the proprietary exercised the powers of the king in appointing the governor, in calling together the legislature and in approving or disapproving the laws enacted.

In the provincial governments there was a delegation by royal commission of the authority of the king to a governor as the king's deputy, with a council to assist the governor appointed in the same way.

The council acted as a senate or upper house, in the enactment of the laws. The governor had the veto power, and prorogued and dissolved the legislature.

These royal commissions provided that the laws enacted should be agreeable to the laws and statutes of England and that they should be transmitted to England for approval by the Privy Council.

These colonial charters, grants and commissions were constitutions of government.

In the case of the Island of Grenada decided in 1774 it was held by the King's Bench in an unanimous opinion by Chief Justice Mansfield that if the crown by a commission to the governor of a province conferred legislative power

on assemblies to be called by the governor, the commission became the constitution of the province; it was irrevocable by the crown, and precluded the King from resuming his legislative authority over the province. (*Campbell vs. Hall, Cowp.* 204.) The suit was an action against a collector of customs to recover money paid as a duty on exports. The King had imposed a duty on exports from the island without the consent of the legislative assembly of the colony or of the British parliament.

It was fortunate for America that these English colonies were planted under royal charters, commissions and proprietary grants, as it enabled them to enjoy a reasonable measure of self government and to build up representative assemblies for the exercise of the power of taxation and legislation.

The colonies were subject to two kinds of legislative action by the home government, prerogative legislation by the king in council, and parliamentary legislation by parliament, that is, by the king in parliament. Prerogative legislation was subject to the qualification that the king could not revoke a charter by an order in council, and a commission granting legislative authority to a colony was irrevocable. On the other hand an act of parliament could be amended or repealed. This was the inevitable result of the doctrine of parliamentary sovereignty which was so completely established by the Revolution of 1688.

Before that event there was very little if any interference by parliament with the colonies, and it was long afterwards before any burdensome or obnoxious acts were passed.

The acts of navigation and trade of the reign of Charles II. prohibiting imports or exports into or from England,

Ireland, or into or from the colonies except in British ships manned by English sailors, although not strictly enforced in America, retarded the progress of the colonies; but it was not until the reign of George III., which began in 1760, that the King in parliament presumed to exercise full legislative authority over the colonies in all cases whatsoever; and it was discovered that the easy way to annul a colonial charter was to pass, without notice to the colony, without an allegation, without a hearing, and without evidence, an act of parliament for the government of the colony.

For nearly one hundred and fifty years the colonies enjoyed the benefits of colonial self government by their own legislative assemblies. It began under the very first charter granted, that of the double barrelled Virginia company. It is an interesting fact, that the movement which resulted in parliamentary sovereignty began in the Virginia company of London.

The council in England of that company became divided into two factions. In the king's party were the Earl of Warwick, Alderman Sir Robert Johnson and Sir Thomas Smith. The latter was the first treasurer and head of the company, and a favorite of the King. In the opposition, or people's party, were Sir Edwin Sandys, the Earl of Devonshire, Sir Edwin Sackville, the Earl of Southampton the patron of Shakespeare, and other men of note and influence.

The administration of Sir Samuel Argall as governor of Virginia having proved very unsatisfactory, and producing great discontent in the company, Sir Thomas Smith tendered his resignation as treasurer. Much to his chagrin it was accepted and Sir Edwin Sandys was elected to take his place. He proved a very efficient officer and the com-

pany desired to re-elect him, but the King protested against it, and after conferences with the King the matter was compromised by the election of the Earl of Southampton.

During the ascendancy of Sandys and his faction in the company, two grants were made by it, which planted the seeds of representative government in America and from which the most momentous consequences flowed.

The company appointed Sir George Yeardley Governor of Virginia with authority to call colonial assemblies, and July 30, 1619, the first legislative assembly to be held in America met in the little church in Jamestown.

About the same time, June 9-19, 1619, the company granted a patent to the Pilgrims at Leyden, under which they sailed for America in the Mayflower.

Sir Edwin Sandys was a son of Edwin Sandys, Archbishop of Canterbury. William Brewster, one of the great Pilgrim fathers, became acquainted with the family at Scrooby, where he held the Manor House from Sir Samuel Sandys, a brother of Sir Edwin. Brewster was postmaster of Scrooby from 1589 to 1607 and was one of the church there of which John Robinson was pastor.

After the members of this church were joined in communion in 1606 they ordinarily met at the Manor House on the Lord's day, and were entertained by Brewster until he and they fled to Holland.

When the Pilgrims in 1617 sought authority to settle in America they found a great friend in Sir Edwin Sandys and through his efforts obtained a patent from the Virginia company, of London. As they landed on the inhospitable shores of Cape Cod two hundred miles north of the north line of Virginia, the patent was no use to them, and

it was lost and no copy of it is in existence. We can form a very good opinion of its contents by examining the instrument granted by the company two years later establishing a government in Virginia.

In 1621 Sir Francis Wyatt was appointed governor and brought with him to Virginia a written constitution which put in definite form the right to convene assemblies.

FIRST CONSTITUTION OF VIRGINIA.

An Ordinance and constitution of the Treasurer, Council, and Company in England for a council of State and General Assembly. Dated July 24, 1621.

1. To all People, to whom these presents shall come, be seen, or heard, The Treasurer, Council, and Company and adventurers and planters for the city of London for the first Colony of Virginia, Send Greeting. Know ye, that we, the said Treasurer, Council and Company, taking into careful consideration the present state of the said colony of Virginia, and intending by the Divine Assistance to settle such a form of government there as may be to the greatest benefit and comfort of the people and whereby all injustice, grievances and oppression may be prevented and kept off as much as possible from the said colony, have thought fit to make our entrance, by ordering and establishing such supreme council, as may not only be assisting to the Governor for the time being in the administration of justice, and the executing of other duties, to the office belonging, but also, by their vigilant care and prudence may provide, as well for a remedy of all inconveniences, growing from time to time as also for advancing of increase strength, stability and prosperity of the said colony.

2. We therefore, the said treasurer, council, and company, by authority directed to us from his Majesty under the great seal, upon mature deliberation do hereby order and declare, that, from, hence forward, that, there shall be two supreme councils of Virginia, for the better government of the said colony aforesaid.

3. The one of which councils to be called The Council of State (and whose office shall briefly be assisting with their care, advice, and circumspection to the said governor), shall be chosen, nominated, placed and displaced, from time to time, by us, the said treasurer, council, and company and our successors. Which council of state shall consist for the present only of these persons as are here inserted, viz., Sir Francis Wyatt, Governor of Virginia; Captain Francis West, Sir George Yeardley, Knight; Sir William Neuce, knight marshal of Virginia; Sir George Sandys, treasurer; Mr. George Thorpe, deputy of the college; Captain Thomas Neuce, deputy for the company; Mr. Powlet, Mr. Leech, Captain Nathaniel Powel, Mr. Christopher Davison, secretary; Doctor Potts, physician to the Company; Mr. Roger Smith, Mr. John Berkeley, Mr. John Rolfe, Mr. Ralph Harner, Mr. John Pountis, Mr. Michael Lapworth, Mr. Harwood, Mr. Samuel Marcock, which said counsellors and council, we earnestly pray and desire, and in his Majesty's name strictly charge and command, that (all factions, partialities sinister, be laid aside) they bend their care and endeavours to assist the honour and service of God, and the enlargement of his kingdom, amongst the heathen people; and next in erecting of the said colony in due obedience to his Majesty and all lawful authority from his Majesty's directions; and lastly, in maintaining the said people; and in justice and christian conversation amongst themselves, and in strength and ability to withstand their enemies. And this council, to be always, or for the most part, residing about or near the governor.

4. The other council more generally to be called by the governor, once yearly, and no oftener, but for very extraordinary and important occasions, shall consist for the present of the said council of state, and of two burgesses out of every town, hundred, or other particular plantation, to be respectively chosen by the inhabitants, which Council shall be called The General Assembly, wherein (as also in the said council of state) all matters shall be decided, determined, and ordered, by the greater part of the voices then present, reserving to the governor always a negative voice; and this general as-

sembly shall have free power to treat, consulte, and conclude, as well of all emergent occasions concerning the public weal of the said company and every part thereof, as shall from time to time appear necessary or requisite.

5. Whereas in all other things, we require the said general assembly, as also the said council of state, to imitate and follow the policy of a form of government, laws, customs, and manner of trial, and other administration of justice used in the realm of England as near as may be, even as ourselves, by his Majesty's letters patent, are required.

6. Provided, that no law or ordinance, made in the said general assembly, shall be or continue in force or validity unless the same shall be solemnly ratified and confirmed in a general quarter court of the said company, here in England and so ratified, be returned to them under our seal; it being our intent to afford the like measure also into the said colony, and after the government of the said colony shall once have been well framed, and settled accordingly, which is to be done shall have been so by us declared, no orders of court afterward shall bind the said colony, unless they be ratified in like manner in the general assemblies. In witness whereof we have hereunto set our common seal the 24th of July, 1621, and in the reign of our Sovereign Lord James, King of England, etc.

This constitution was not the act of the settlers in Virginia, but it was very acceptable to them. It was framed and issued by the Virginia Company of London when that company was antagonistic to the King and was not under the royal influence.

We can form our best estimate of the resolute character of Sir Edwin Sandys from a speech he made in the House of Commons in 1614 which was remarkable for his day and generation.

He maintained "that the origin of every monarchy lay in election; that the people gave its consent to the King's authority upon the express understanding that there were

certain reciprocal conditions which neither the king nor the people might violate with impunity, and that a king that pretended to rule by any other title such as conquest might be dethroned whenever there was sufficient force to overthrow him." (1 Commons Jour., 493.)

We get another glimpse of Sir Edwin Sandys from the King's outspoken opposition to him when the Virginia company wanted to re-elect him as treasurer. In answer to appeals from Southampton and others King James declared that "the Virginia Company was a seminary for a seditious parliament;" that Sandys was his "greatest enemy" and that "he could hardly think well of whomsoever was his friend," and in a furious passion he closed by saying "choose the devil if you will but not Sir Edwin Sandys." (*Neill's His. Virg. Co., of London*, 185.)

The constitutional significance of the controversy in the Virginia Company of London over the government of the colony comes from the fact that the patriot or parliamentary party in England made its first stand against the court party in that company.

The King pursued the company relentlessly, and he was aided by the minority of the adventurers or stockholders. The company was brought before the Privy Council with the view of obtaining a voluntary surrender of its charter, but as the majority were opposed to the doctrine of the Stuarts that the King governed by divine right all attempts to secure a surrender failed. Commissioners were sent to Virginia to investigate, and to obtain evidence against the company, and as a last resort the King instructed the Attorney General to sue out a writ of *quo warranto* in the King's Bench against the company to forfeit its charter. The company sought to obtain protection from parliament, but before anything was done the King sent a message to the House informing it that the admin-

istration of Virginian affairs had been specially entrusted to the Privy Council and forbidding any interference. The popular party was not yet strong enough to prevent the House from reluctantly acquiescing.

The quo warranto case came on to be heard in the King's Bench. "The Attorney General attacked the patent on the ground that it granted the privilege of 'transporting the King's subjects to Virginia, a privilege which, if continuously exercised, might in time depopulate the realm and transfer the whole English nation to the dominion of the company.' "

But it matters not whether the plea was good or bad. The patriotic spirit of resistance which had shown itself so fully in the company, and which was gradually awakening in Parliament had no place in the law courts, and on the 24th of July, 1624, judgment was pronounced declaring the patent null and void. (*Doyle's English Colonies in America*, vol. 1, p. 180.)

From the dissolution of the Virginia Company in 1624 until the Revolution in 1776, Virginia was governed as a royal province under the direct control of the King of England.

In 1623, the year the royal commissioners came to Virginia, hunting for evidence to annul the charter, the General Assembly adopted a declaration of principles the most important of which was that the Governor was not "to lay any taxes or impositions upon the colony or their lands or other way than by the authority of the General Assembly, to be levied and employed as said Assembly shall appoint."

The Virginia colonists never receded from this principle, and thus we see that Sir Edwin Sandys and his friends in the London Company planted representative taxation on American soil.

We cannot pay too much honor to the memory of Sir Edwin Sandys. He is in the same class as Archbishop Langton, and Simon de Monfort.

The Pilgrims from Leyden realizing that their patent from the London Company was of no validity outside the territory of that company, proceeded before they disembarked from the Mayflower to organize a government of their own.

They signed their famous compact organizing themselves into a body corporate and politic. The forty-one persons, composing the company who signed, together with the women, children and servants made the total number of persons who landed on Plymouth Rock one hundred and two.

AGREEMENT BETWEEN THE SETTLERS AT NEW PLYMOUTH.

In the name of God, Amen.

We, whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, etc., having undertaken for the glory of God, and advancement of the Christian faith, and the honour of our King and Country, a voyage to plant the first Colony in the northern parts of Virginia; do by these Presents solemnly and mutually in the presence of God and one another, covenant and combine ourselves together into a civil body, politik, for our better ordering and preservation, and furtherance of the ends aforesaid: And by virtue hereof to enact, constitute, and frame, such just and equal laws, ordinances, acts, constitutions, and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; unto which we promise all due submission and obedience. In witness whereof we have hereunto subscribed our names at Cape Cod the eleventh of November, in the reign of our sovereign Lord King James, of England, France and Ireland, the eighteenth, and of Scotland, the fifty-fourth, Anno. Dom. 1620.

John Carver,
 William Bradford,
 Edwin Winslow,
 William Brewster,
 Isaac Alorton,
 Miles Standish,
 John Goodman,
 Edward Tilly,
 John Tilly,
 Francis Cooke,
 Thomas Rogers,
 Thomas Tinker,
 John Alden,
 Samuel Fuller,
 Christopher Martin,
 William Mullins,
 William White,
 Richard Warren,
 John Howland,
 Stephen Hopkins,
 John Turner,

Francis Eaton,
 James Chilton,
 John Craxton,
 John Billington,
 Joses Fletcher,
 John Ringdale,
 Edward Fuller,
 Digery Priest,
 Thomas Williams,
 Gilbert Winslow,
 Edmond Margeson,
 Peter Brown,
 Richard Bitteridge,
 George Soule,
 Richard Clark,
 Richard Gardiner,
 John Allerton,
 Thomas English,
 Edward Doten,
 Edward Liester.

While this instrument recognized James I. as King of England it contained no reservation of conformity with the laws of England, but that was implied. They simply bound each other to submit to such laws and ordinances as the community, in general meetings, should from time to time enact. It was not much of a constitution when compared with the elaborate instruments in force in the United States at the present time, but it was sufficient to meet the necessities of the occasion, and it had the merit of establishing a government of the people by the people.

True to their Teutonic instincts and traditions, they reproduced in America the "mark" of the ancient Germans and the "village township" of the Anglo-Saxons in their settlements in England.

The first earlderman, gerefafa, or civil officer at the head of the Plymouth Colony was John Carver, the Governor, and its first heratoga or military leader was Capt. Miles Standish. Their spiritual welfare was in charge of William Brewster as the ruling elder of their church. Their pastor, John Robinson, intended to but never did come over.

These Pilgrims, with the exception of Elder Brewster, who had been a student at Cambridge, were simple rustics, farmers or workmen. They were separatists from the Church of England, and were poor and friendless, and exiles for opinion's sake from their native country.

The Fundamental Orders adopted by the pioneers who left the colony of Massachusetts Bay and settled at Hartford and vicinity on the Connecticut river is a much more elaborate instrument than the compact on the Mayflower, but it established a representative democracy in its most simple form.

The Fundamental Agreement of those who settled at New Haven is of the same nature.

You will find these instruments in *Vol. 1, American Charters and Constitutions, and Organic Laws*, published by the Government.

They should be studied, regardless of their religious features, as interesting phenomena showing the capacity of the first settlers on this continent from England, Scotland and Ireland, to form their own schemes of government, and to govern themselves.

Roger Williams and other immigrants who were driven out of Massachusetts, settled in Rhode Island in 1636, and in 1640 they entered into a Plantation Agreement for the town of Providence and established "a pure democracy, which for the first time guarded jealously the rights of

conscience by ignoring any power in the body politic to interfere with those matters that alone concern man and his maker."

The Plantation Agreement says:

"Wee agree as formerly hath bin the liberties of the town, so still, to hould forth liberty of conscience." *Vol. 6 Am. Charters, Constitutions and Organic Laws.*

In order to appreciate the distinguished services of Roger Williams in behalf of liberty of conscience it is only necessary to read the sketch of his life in Appleton's *Cyclopedia of American Biography*.

He was a gentle and mild mannered man, but pugnacious in controversy.

Bibliography. "English Colonies in America" in 3 vols., and 2 additional vols., entitled "The Middle Colonies," and "The Colonies under the House of Hanover," by Jon. A. Doyle of Oxford University, are a comprehensive history of the English in America, including the conquest of Canada, and are very valuable as books of reference.

"The Story of the Pilgrim Fathers, 1603-1623 A. D.; as told by Themselves, their Friends, and their Enemies," by Edward Arber, is valuable for the information and documents it contains, showing the negotiations of the Pilgrims with the Virginia Company of London, with the Privy Council, with the Dutch, and with the Adventurers from 1617 to 1620 in their efforts to secure a patent or grant with which to migrate to America.

"A Short History of the English Colonies in America," by John Cabot Lodge, now a United States Senator from Massachusetts, is the best work for a student at law who desires to make himself familiar with the foundations of the United States.

XII.

THE LEGISLATIVE.

(Continued).

The legislative power cannot be delegated—Acts of 31 Henry VIII, authorizing the King to legislate by proclamation—Opinion of the judges that the proclamations of the King are not law—Ordinance for the government of the territory northwest of the river Ohio—Provisional executive governments with legislative power in the Territories of the United States—The steady progress of representative government from the Atlantic to the Pacific and to the insular possessions of the United States.

The division of our American governments into three co-ordinate branches, necessarily prevents either of these departments from delegating its authority to the other two or to either of them, but there are other reasons why the legislative power cannot be delegated.

Representative government vests in the persons chosen to exercise the power of voting taxes and enacting laws, the most important and sacred trust known to civil government. The representatives of the people are required to exercise wise discretion and a sound judgment, having due regard for the purposes and needs of the executive and judicial departments, the ability of the tax payers to respond, and the general public welfare. It follows as a self evident proposition that a representative legislative assembly must exercise its own judgment; that in giving its consent to a tax levy it must distinctly and affirmatively determine the amount of the tax, by fixing a

definite and certain rate, or by fixing an aggregate amount, to be spread against the tax payers on some basis of apportionment; and that in enacting a law, it must so far express itself, that the act when it leaves the legislative department is a complete law.

It is, therefore, an axiom of constitutional law, that a representative-legislative body cannot delegate its power.

“The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility, by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.” (Cooley’s Const. Lim. 7th ed. 163.)

If it was competent for a representative-legislative body to delegate its power it would be apt to make the delegation to the executive, which would be destructive of representative government and a return to despotism. Not only the nature of the legislative power but the very existence of representative government depends upon the doctrine that the power of a representative assembly to levy taxes and make laws cannot be abdicated or in any way transferred to any other body or authority.

Like all the great principles of constitutional law it was only gradually developed, and full and complete recognition of its binding force and effect is not yet attained.

John Locke, the philosopher, was born in 1632 and lived until 1704, covering the most eventful period in the constitutional history of England. He wrote his “Two Treatises on Government,” during the revolution of 1688,

and expressed himself on the question of delegating legislative power as follows:

“The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative and appointing in whose hands that shall be. And when the people have said we will submit to rules and be governed by laws made by such men and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.”

The most conspicuous example in English history of a violation of this principle of constitutional law is the Act of Parliament of the reign of Henry VIII giving the proclamations of the King the same force and effect as if they had been made by Parliament.

31 HENRY VIII, C. 8.

“The King for the time being, with the advice of his council or the more part of them, may set forth proclamations under such penalties and pains as to him and them shall seem necessary which shall be observed as though they were made by act of parliament; but this shall not be prejudicial to any person’s inheritance, offices, liberties, goods, chattels or life; and whosoever shall willingly offend any article contained in said proclamations shall be such forfeitures or be so long imprisoned as shall be expressed in said proclamations; and if any offending will depart the realm, to the intent he will not answer his said offence, he shall be adjudged a traitor.”

To enforce this act it was further enacted, 34 Henry VIII C. 13, that judgment might be given any offenders of it by nine of the King's Council.

On the death of Henry VIII his son, Edward VI, succeeded to the throne when he was only ten years of age. Edward Seymour, Earl of Hertford, the eldest brother of the King's mother, was chosen Protector by the Council of the Regency, and created Duke of Somerset. He was opposed to arbitrary government and during the first year of the reign secured the repeal of the two statutes concerning proclamations, and also of some other acts relating to treason felonies. (1 Edward VI. c. 12).

In 1610 when Sir Edward Coke was Chief Justice of the Court of King's Bench he was sent for to attend the Privy Council to give his opinion on two questions; the one, if the King by his proclamation may prohibit new buildings in and about London; and the other, if the King may prohibit the making of starch from wheat. The Lord Chancellor said he would advise the Judges to maintain the power and prerogative of the King. Coke asked leave to consult his brethren of the Bench and was directed to consult with the chief justice of the common please, the chief baron of the exchequer, and Baron Altham. The opinion of the judges is reported by Coke. (12 Coke's Rep. 74, 75.)

OPINION OF THE JUDGES THAT THE PROCLAMATIONS OF THE KING ARE NOT LAW.

"In the same term it was resolved by the two Chief Justices, Chief Baron and Baron Altham, upon conference betwixt the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by

his proclamation in a high point; for if he may create an offense where none is, upon that ensures fine and imprisonment: also the law of England is divided into three parts, common law, statute law and custom; but the King's proclamation is none of them: also **malum aut est malum in sex aut probabitum** that which is against common law is **malum in sex**, **malum prohibitum** is such an offence as is prohibited by act of parliament, and not by proclamation.

"Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him.

"But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws, and do not offend them upon punishment to be inflicted by the laws, &c.

"Lastly, if the offence be not punishable in the Star-chamber, the prohibition of it by proclamation cannot make it punishable there: and after this resolution, no proclamation imposing fine and imprisonment, was afterwards made, &c."

The creation of subordinate local governments is usually mentioned and treated by jurists and law-writers as a delegation of power and as an exception from the general rule on the subject, but this view is not altogether correct, for the power to recognize existing or to create new local governments is constitutionally subject to this very important limitation, that the power of the local governments to levy taxes and to make laws, must be vested in the people or their immediate representatives, and that in these local governments this essential and characteristic feature of representative government must be preserved.

No historical document illustrates and enforces this principle of constitutional law more clearly than the ordinance for the government of the territory of the United States northwest of the river Ohio, which was ordained by Congress after the definitive treaty of peace between

the United States and Great Britain of 1783 had fixed the Mississippi River as the western boundary of the United States, and before the adoption of the federal constitution.

This ordinance expressly declares that the vesting of the legislative power in the Governor and Judges appointed by the President was only to be temporary and provisional; that as soon as the Territory had five thousand free male inhabitants, a general assembly could be organized, the principal branch of which should consist of a House of Representatives elected by the people; that not less than three or more than five states should be formed in the Territory and that when any of them had sixty thousand free inhabitants, a permanent constitution and state government could be formed, provided they were republican and in conformity with the principles of the ordinance.

In accord with the principles thus enunciated the constitution of the United States authorizes Congress to admit new States into the Union, but all new states must be republican, for it is expressly declared that the United States shall guarantee to every State in the Union a republican form of government. The power of Congress to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, must be read and construed in connection with the ordinance for the government of the Northwest Territory, the constitutional provisions mentioned above and the great historical events which led to American independence. It is impossible to believe that the people of the United States intended any such contradiction of their chief object and aim as would permit the existence within the territory subject to the juris-

diction of the United States, of monarchical or oligarchical governments, either in whole or in part, or of any other kind of governments, either in whole or in part, or of any other kind of government than a representative one in form and in substance.

It is, therefore, a paramount and supreme rule in the United States that no tax, or charge of any kind or nature, can be imposed or any law be enacted, by the national, or the state or the local governments, except with the consent of the people themselves or their immediate representatives directly chosen by them to exercise a judgment on their behalf. This rule is prescribed by the constitution of the United States, and by the constitution of the several States, and is inherent in our system of government.

Provisional executive governments with legislative powers as temporary expedients may or may not, according to the facts in each particular case, be permissible; but sooner or later they must give way to representative government, which is the only kind of government that can permanently exist on American soil.

A House of Representatives was elected in the North West Territory in 1798, and the general assembly held its first session in 1799, only twelve years after the ordinance of 1787 was passed. The Territory was divided by Congress in 1800, and all the lands therein west of a line drawn from a point on the Ohio river opposite to the mouth of the Kentucky River to Fort Recovery and thence north through the center of the lower peninsula of Michigan to the national boundary line was made a separate territory to be called Indiana, the government of which to be in "all respects similar" to that provided

by the ordinance of 1787, with this modification, that a general assembly might be organized therein before the territory had five thousand free male inhabitants. This permitted a House of Representatives to be elected and a general assembly created which held its first session in 1805.

The State of Ohio was admitted into the Union in 1802 and the Michigan portion of the North West Territory was transferred to Indiana.

In 1805 the territory of Indiana was divided into two territories by the creation of the territory of Michigan which was given a temporary government similar to the ordinance of 1787. Its territorial limits were the lower peninsula of Michigan, and the eastern half of the Upper Peninsula. In 1818 Congress extended its jurisdiction as far west as the Mississippi river thereby including all of Wisconsin; and in 1834 as far west as the Missouri river and the White Earth river which flows into the Missouri from the north in what is now Ward County in North Dakota. The whole of the present State of Iowa was included.

Under the ordinance of 1787 Michigan was entitled to a general assembly with an elective house of representatives when it had five thousand free male inhabitants. In 1818 the people of the territory voted on the question of passing to what was called the second stage of government but there was a large majority against it. The inhabitants were French who knew nothing of the advantages of representative government, and were satisfied with the administration of Gen. Lewis Cass who had been governor of the Territory from 1813 and continued

in office until 1831 when he became Secretary of War in the cabinet of President Jackson.

Congress remodeled the territorial government in 1823 by providing for a legislative council consisting of nine persons selected by the President and confirmed by the Senate from eighteen persons elected by the qualified electors of the territory. All the powers granted to the Governor, Legislative Council and House of Representatives of the North Western Territory were conferred upon the Governor, and this Legislative Council of nine persons. The legislature thus created was given "power to submit at any time to the people of said territory the question, whether a general assembly shall be organized agreeably to the provisions of the ordinance aforesaid."

In 1825 the electors were authorized to elect twenty-six persons from whom President selected thirteen to constitute the legislative council. In 1827 the people were authorized to elect the thirteen, without any choice by the President.

In 1790 Congress gave the inhabitants of the territory of the United States south of the River Ohio "all the privileges, benefits and advantages set forth in the ordinance of the late Congress for the government of the territory of the United States Northwest of the River Ohio," with this qualification that Congress should make no regulations which should "tend to emancipate slaves," in that part of the territory ceded by the State of North Carolina, and since known as Tennessee.

Kentucky had been a part of Virginia, and was created a State and admitted into the Union in 1792, and Tennessee was admitted in 1796, leaving the region south of

Tennessee, subject to the Act of Congress creating the South Territory. In 1798 Congress created the territory of Mississippi. The President was authorized to establish a government in all respects similar to that of the Northwest Territory, and the people were given all the rights, privileges and advantages of the ordinance of 1787. Under the ordinance a general assembly could not be organized until the territory had five thousand free male inhabitants, but in 1800 that limitation was withdrawn by Congress and the immediate organization of a general assembly was provided for. Representative government was only delayed for two years.

The eastern part of Mississippi Territory was organized as the Territory of Alabama in 1817 and given immediate representative government.

The Louisiana Purchase was followed by the Act of Congress of 1803 authorizing President Jefferson to take possession, and that "all of the military, civil and judicial powers exercised by the existing government of the same shall be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion."

The following year Louisiana was divided into two territories. All north of the thirty-three degree of north latitude was organized as the District of Louisiana and subject to the government of the Governor and Judges of Indiana Territory. The southern portion of the cession was made the territory of Orleans, in which the executive power was vested in a Governor appointed by the President, and the legislative power was vested in

the Governor and thirteen real estate holders appointed by the President. At first there was considerable dissatisfaction with American rule, but in 1805 Congress extended to the territory so much of the ordinance of 1787 as relates to the organization of a general assembly, and provided that representatives should be elected in October and the General Assembly should hold its first session in December, 1805. Representative government was only withheld three years, and in 1812, ten years after the purchase, Orleans Territory was admitted into the Union as the State of Louisiana.

During the Napoleonic wars in Europe the Spanish possessions in America were open to naval attack and occupancy. Congress in secret session in 1811 passed an act authorizing the President to take possession of all that part of Florida east of the River Perdido and gave him power "to establish within the territory aforesaid a temporary government, and the military civil and judicial powers thereof shall be vested in such person and persons and be exercised in such manner, as he may direct for the protection and maintenance of the inhabitants of the said territory in the full enjoyment of their liberty, property and religion."

In 1813 the authority of the President was extended to "all that tract of country west of the River Perdido not now in the possession of the United States."

The treaty with Spain for the cession of Florida was negotiated in 1819, and Congress passed a similar act authorizing the President to take possession when the treaty was ratified by the King of Spain, which event did not take place until 1821. Congress then passed the Act of 1822 establishing a territorial government in which

the executive power was vested in a Governor appointed by the President, and the legislative power was vested in the Governor appointed by the President, and in thirteen of the most fit and discreet persons of the territory, to be called the Legislative Council, who shall be appointed by the President with the consent of the Senate from among the citizens of the United States residing there. In 1823 the act was amended so that inhabitants of the Territory at the time of the cession were made eligible to appointment to the legislative council.

In 1826 Congress provided for the annual election by the people of a legislative council, and authorized the governor to divide the territory into thirteen election districts for that purpose. Representative government was only deferred for five years from the ratification of the treaty with Spain.

The Republic of Texas was admitted into the Union as a state in 1845, without any prior territorial government. This led to the war with Mexico which was terminated by the cession to the United States of all the rights of Mexico to the territory between the Louisiana Purchase and the Pacific ocean, and north and west of Texas, and north of Gila River and the southern boundary of California.

California was admitted into the Union without any prior territorial organization in 1850 and the balance of the territory ceded by Mexico and some acquired from Texas was made the territory of New Mexico with immediate representative government.

The creation of the territory of Utah, soon followed, and both of these territorial acts contained this provi-

sion: "That when admitted as a state, the said territory, or any portion of the same shall be received into the Union with or without slavery, as their constitution may prescribe at the time of their admission."

The acts for the organization of the territories of New Mexico and Utah with the above provision, and the more stringent fugitive slave law approved a few days later, were a concession to the pro-slavery sentiment of the southern states, and the acts for the admission of California as a free state, and the abolition of the slave trade in the District of Columbia, approved shortly afterwards, were a concession to the anti-slavery sentiment of the northern states. Together these acts constituted the compromise of 1850 proposed by Henry Clay, and defended by Daniel Webster, as the last service of these distinguished and popular statesmen, in behalf of the Union they loved so well.

The Oregon country consisted of all the territory between the Rocky mountains and the Pacific ocean, north of the north line of California, extended east to the Rocky mountains, and south of $54^{\circ} 40'$ north latitude. The northern boundary was fixed at the 49° by treaty with England in 1848. It was immediately organized as the Territory of Oregon and given a representative government.

We will now go back to the imperial possessions of the Territory of Indiana and the Territory of Michigan.

The District of Louisiana at first subjected to the government of the Governor and Judges of the Territory of Indiana, was organized as the Territory of Louisiana in 1805, the government of which was vested in a governor

and three judges appointed by the President. No provision was made for a general assembly, or representative body. When in 1812 the Territory of Orleans was admitted into the Union as the State of Louisiana, the name of the Territory of Louisiana was changed to Missouri, and under that name was given representative government. No reference was made to the ordinance of 1787, but all the provisions of the ordinance of a constitutional nature, except the provision prohibiting slavery, were included in the Act in the following section :

“Sec. 14. That the people of said territory shall always be entitled to a proportionate representation in the general assembly; to judicial proceedings according to the common law and the usages in force in said territory; to the benefit of the writ of habeas corpus. In all criminal cases the trial shall be by a jury of good and lawful men of the vicinage. All persons shall be bailable unless for capital offences where the proof shall be evident or the presumption great. All fines shall be moderate and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land. If the public exigencies make it necessary for the common preservation to take the property of any person, or to demand his particular services, full compensation shall be made for the same. No ex post facto law or law impairing the obligation of contracts shall be made. No law shall be made which shall lay any person under restraint, burthen, or disability on account of his religious opinions, professions or mode of worship in all which he shall be free to maintain his own and not burthened for those of another. Religion, morality and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall be encouraged and provided for from the public lands of the United States in said territory in such manner as congress may deem expedient.”

The southern part of the territory of Missouri was organized as the Territory of Arkansas in 1819, and provision was made for representative government so soon as the governor was satisfied that such was the desire of the majority of the freeholders.

Part of the territory of Missouri was admitted into the Union as the State of Missouri under an act passed by Congress in 1820. With the exception of a small tract, the whole state was north of latitude $36^{\circ} 30'$ and the last section of the Act since known as the Missouri compromise reads:

“Sec. 8. That in all that territory ceded by France to the United States under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the State contemplated by this Act, slavery and involuntary servitude otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be and is hereby forever prohibited: Provided, always, that any person escaping into the same, from whom labor or service, is lawfully claimed, in any State or territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.”

In 1809 the Territory of Indiana was divided into two territories by the creation of the Territory of Illinois, which was given jurisdiction, west of the Wabash River and a line drawn due North from Post Vincennes. The government was to be in all respects similar to that provided by the ordinance of 1787 and representative government could be established before the territory had five thousand free male inhabitants, if satisfactory evidence was given to the governor that such was the wish of a majority of the freeholders.

The Territory of Michigan was not divided until 1836, when it was about to be admitted into the Union as a State. The territory west of the center of Lake Michigan, and the channel of Green Bay and the Menominee and Montreal Rivers, and east of White Earth river and the Missouri river, was given a territorial organization under the name of Wisconsin, with immediate representative government, and all the rights and subject to all the restrictions of the ordinance of 1787.

In 1838 all that part of the territory of Wisconsin west of the Mississippi River and a line drawn due north from its head waters, was made the territory of Iowa with the same kind of government, and in 1849 when Iowa was admitted into the Union, all the territory not included in the state was organized as the Territory of Minnesota with immediate representative government.

In 1854 the celebrated Act organizing the Territories of Kansas and Nebraska was passed. Immediate representative government was thereby established for that vast section of country between the summit of the Rocky Mountains on the west and the White Earth River and the Missouri River and the western boundary of the state of Missouri on the east.

The Act contains the following provision for each of said territories :

“That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory as elsewhere within the United States, except the eighth section of the Act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which being inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of

Eighteen hundred and fifty, commonly called the compromise measures is hereby declared inoperative and void, it being the will, intent and meaning of this Act not to legislate slavery into any Territory or State nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the constitution of the United States; Provided, That nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the Act of March sixth, eighteen hundred and twenty, either protecting, establishing, prohibiting or abolishing slavery."

If property in slaves had been of the same legitimate character as that in cattle and other domestic animals this abortive attempt to settle the question of slavery in the territories, on the basis of popular sovereignty would have been commendable. First proposed by Lewis Cass who was a firm and consistent friend of the people during a long and useful public service, in the hands of Stephen A. Douglas, a strong and able partisan fighter, it enabled his party to elect James Buchanan, president, and to delay the attempt of the south to dissolve the Union; but it was doomed to utter failure because it authorized a violation of the paramount principle of constitutional law, that no person shall be deprived of life, liberty or property without due process of law. This subject will be considered in another volume. We are now tracing the progress of representative government across the continent.

Washington Territory with representative government had been carved out of Oregon in 1853; and in 1861 during the closing days of the Buchanan administration and after some of the senators from the southern states had withdrawn from the senate, bills were passed and approved by the President, giving the like kind of govern-

ments to the territories of Colorado, Nevada and Dakota. Arizona, Idaho and Montana followed in 1863 and 1864; Wyoming in 1868, and Oklahoma in 1890; all with immediate representative government and in the usual form.

Alaska was ceded to the United States by Russia in 1867, and an act passed by Congress in 1868 extended to it, the laws of the United States relating to customs, commerce and navigation. The act gave the President power to restrict and regulate or to prohibit the importation and use of fire arms, ammunition, and distilled spirits into and within said territory, and made it a criminal offense to violate such regulations. It was made unlawful for any person to kill any otter, mink, martin, sable or fur seal or other fur-bearing animal within the limit of said territory or in the waters thereof "provided that the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable, or other fur-bearing animals, except fur seals under such regulations as he may prescribe; and it shall be the duty of the said Secretary to prevent the killing of any fur seal and to provide for the execution of the provisions of this section until it shall be otherwise provided by law. Provided that no special privileges shall be granted under this act."

Criminal jurisdiction was conferred on the United States District Courts in California and Oregon and the District Courts in Washington. An Act to prevent the extermination of fur-bearing animals in Alaska was passed in 1870, and the act of 1834 to regulate trade and intercourse with Indian tribes was extended to Alaska in 1873. A civil government was established in 1884 by making the general laws of the State of Oregon then in force "the law in said district so far as the same may be

applicable and not in conflict with the provisions of this act or the laws of the United States" and providing for the appointment by the President of a governor, the judge of a district court and other officers. The Act contained an express provision that there shall be no legislative assembly in the District nor any delegate sent to Congress.

In 1899 Congress enacted a complete criminal code for Alaska and in 1900 a civil government code, and a code of civil procedure. These codes are of the same elaborate character as the codes in many of the States. No general legislative body is created, Congress thereby retaining full legislative control as the only legislature known to Alaska. The reason for this exceptional action is the isolated situation of the settlements as mining camps and towns scattered at great distances from each other along an almost endless sea coast and the shores of rivers flowing to the sea.

Under these conditions Congress wisely enacted the Alaskan codes, and provided therein for the incorporation of towns by their inhabitants under the supervision of the judge of the United States District Court presiding over the division wherein the community is located. The government of these towns is vested in a common council of seven members elected by popular vote. A school board of three directors is also elected.

"The council shall have the following powers:

First: To provide suitable rules governing their own body, and to elect one of their number president, who shall be ex-officio mayor.

Second: They may appoint, and at their pleasure remove, a clerk, treasurer, assessor, and such other officers as they deem necessary.

Third: To make rules for all municipal elections, provided no officer shall be elected for a longer term than one year.

Fourth: By ordinance to provide for necessary street improvements, fire protection, water supply, lights, wharfage, sewerage, maintenance of public schools, protection of public health, police protection and the expense of the assessment and collection of taxes.

Fifth: To impose and collect a poll tax on electors, tax on dogs, a general tax on real and personal property, possessory rights and improvements, and such license tax on business conducted within the corporate limits as the council may deem reasonable; provided no such tax shall exceed one per centum on the assessed valuation of property and all assessments made by the corporation assessor shall be subject to review in the council and appeals may be taken from their decisions to the District Court; Provided further, no bonded indebtedness whatever shall be authorized for any purpose."

Annual elections and terms of office gave the people full control, and prompt means of rescuing the municipality from the rule of corrupt or incompetent representatives or officials; and during the official year the mayor and other officers are held strictly responsive to the council because they are subject to removal at its pleasure. Legislative power was given over every subject of concern to the locality, the only restraints being the very wise limitation of the taxing power to one per cent annually of the assessed valuation of property, and the equally wise entire prohibition of municipal indebtedness. With a good code of general laws, and this identical charter for each municipality, the people who inhabited Alaska were assured a bright future as far as civil government is concerned. Each community was a little State.

In view of the isolated location as compared with each other, of the camps and towns of Alaska and until the

population becomes seated and permanent, Congress could not have devised a better way of introducing representative government. In the natural course of development the local organizations should precede the establishment of a general territorial government. In the meantime Congress has provided an executive department in a Governor, and a few other officials and a judicial department consisting of District Courts with an appellate jurisdiction in the Supreme Court of the United States and in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco; and it has coupled with these a perfected code of laws, drawn from the legal learning and actual experience of the code States.

The serious objection to this plan as a permanent form of government is, that Congress is not representative, and is too far away to act intelligently. Interested parties will get its ear while the great mass of the people will not be heard. However, this condition will only be temporary and before long Alaska will be given a representative legislature to enable the people to work out in their own way their ultimate destiny.

Hawaii was annexed to the United States in 1898. A territorial government with a legislature consisting of a House of Representatives, and a Senate, was established by Congress in 1900. The people elect the members of each of the two houses. The governor, the judges of the supreme and the circuit courts, are appointed by the President, and the territorial governor with the consent of the territorial senate, appoints the attorney general, treasurer and other officers of the territory. The Act extends to the territory the constitution of the United States; and, except as otherwise provided, all the

laws of the United States, which are not locally inapplicable. The excepted laws are a provision of the revised statutes requiring territories, other than Colorado, Dakota, Idaho, Montana and Wyoming, to submit their laws to Congress for approval, and a provision prohibiting religious and charitable corporations in any territory from holding real estate of a greater value than fifty thousand dollars.

The legislative power extends "to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States locally applicable." As far as taxation and legislation is concerned Hawaii has a truly representative government, with this qualification that the governor is given power to "veto any specific item or items which appropriates money for specific purposes," and he is given an absolute veto, after the manner of the constitution of the United States, on all bills passed during the last ten days of a legislative session, if he sees fit to "pocket" the measure and not return it with his objections to the legislature so as to give an opportunity to pass it over his veto by a two-thirds vote of each house.

BIBLIOGRAPHY. "Outlines of the Political History of Michigan," by James Valentine Campbell, for thirty-three years one of the judges of the Supreme Court of Michigan, and for twenty years a lecturer in the Law Department of the State University, should be read by every student of law who desires to become familiar with the historical events, which resulted in the great State of Michigan, and the beautiful and thriving City of Detroit.

XIII.

THE LEGISLATIVE.

(Continued).

The Treaty with Spain ceding the Philippine Islands, Porto Rico and Guam to the United States—Should the Philippine Islands be given their independence?

The Treaty with Spain ceding the Philippine Islands, Porto Rico, and Guam, to the United States was entered into Dec. 10, 1898, and the ratifications were exchanged and the treaty proclaimed April 11, 1899.

Prior to the treaty, the United States had acquired possession of the Islands by conquest, and their temporary government was intrusted to the military authorities under orders and instructions of President McKinley as commander in chief of the army and navy.

An executive order, July 2, 1898, signed by President McKinley, and issued by virtue of his authority as commander in chief of the army and navy of the United States, directed "that upon the occupation and possession of any parts and places in the Philippine Islands by the forces of the United States, the following tariff of duties and taxes to be levied and collected as a military contribution; and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

"Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands."

Annexed to the order was a schedule of duties on exports from and imports into the islands, with a small free list. No distinction was made in favor or against imports from, or exports to the United States.

An executive order, Dec. 21, 1898, signed by President McKinley and directed to the secretary of war, declared that "the destruction of the Spanish fleet in the harbor of Manila by the United States naval squadron commanded by Rear Admiral Dewey, followed by the reduction of the city and the surrender of the Spanish forces, practically effected the conquest of the Philippine Islands and the suspension of Spanish sovereignty therein."

After referring to the treaty of Dec. 10, 1898, the President then went on to indicate the policy the United States would pursue in assuming the control and government of the islands and among other things said:

"Within the absolute domain of military authority, which necessarily is and must remain supreme in the ceded territory until the legislation of the United States shall otherwise provide, the municipal laws of the territory in respect to private rights and property, and the repression of crime are to be considered as continuing in force and to be administered by the ordinary tribunals so far as practical."

An executive order, Jan. 20, 1899, signed by President McKinley and directed to the secretary of state, announced the appointment of a commission consisting of Jacob G. Schurman, Rear Admiral Dewey, Maj. Gen. Otis, Charles Denby and Dean C. Worcester, to visit the Philippine Islands to "aid in the extension of authority throughout the islands and to secure with the

least possible delay the benefits of a wise and generous protection of life and property to the inhabitants.”

The duties of the commission were only advisory: “The temporary government of the islands is intrusted to the military authorities as already provided for by my instructions to the secretary of war of December 21, 1898, and will continue until Congress shall determine otherwise.”

This commission visited the Islands as directed, and Jan. 31, 1900, submitted their report to the President, who transmitted it to Congress Feb. 2, 1900. (36th Cong. 1st sess. Senate Document No. 138).

An act of Congress approved March 2, 1899, appropriated \$20,000,000, to carry out the obligations of the United States to Spain under the treaty of Dec. 10, 1898.

An executive order, April 7, 1900, signed by President McKinley and directed to the secretary of war, appointed William H. Taft, Dean C. Worcester, Luke I. Wright, Henry C. Ide and Bernard Moses “commissioners to the Philippine Islands to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities, subject in all respects to any laws which congress may hereafter enact.”

“Beginning with the 12th day of September, 1900, the authority to exercise, subject to my approval, through the secretary of war, that part of the power of government in the Philippine Islands which is of a legislative nature, is to be transferred from the military governor of the islands to this commission to be thereafter exercised by them in the place and stead of the military gov-

ernor, under such rules and regulations as you shall prescribe, until the establishment of the civil central government for the islands, contemplated in the last foregoing paragraph, or until congress shall otherwise provide.”

“Exercise of this legislative authority will include the making of rules and orders having the effect of law for raising of revenue by taxes, customs duties and imposts; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military governor is now competent to provide by rules or orders of a legislative character.”

This order imposed “upon every division and branch of the government of the Philippines,” as “inviolable rules,” all of the bill of rights of the constitution of the United States except the right to a trial by jury, and the right to keep and bear arms.

It secured to the Philippines all of the constitutional rights of American citizens, with four exceptions:

1. The right to representative taxation and legislation.

2. The right to a free and unobstructed commerce between the islands and the other territory of the United States, whether state, territorial or unorganized.

3. The right to a jury trial as a part and parcel of the American system of representative government.

4. The right to keep and bear arms as essential to a well regulated militia, and the security of a free state.

The first act of Congress for the government of the Philippine Islands was passed as a most appropriate rider on the act of March 2, 1901, for the support of the army. It reads:

“All military, civil and judicial powers necessary to govern the Philippine Islands acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November, nineteen hundred, shall until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion; provided that all franchises granted under the authority hereof shall contain a reservation of the right to alter, amend or repeal the same.”

The Act further provided for reports to Congress, prohibited sales, leases, or other disposition of the public lands or the timber thereon, or mining rights therein; and it “Provided further that no franchise shall be granted which is not approved by the President of the United States, and is not in his judgment clearly necessary for the immediate government of the islands and indispensable for the interest of the people thereof, and which cannot without great public mischief be postponed until the establishment of permanent civil government;

and all such franchises shall terminate one year after the establishment of such permanent civil government.”

Under the authority of this act the President by an executive order, June 21, 1901, vested the executive authority in all civil affairs in the government of the Philippine Islands, in the President of the Philippine Commission, and appointed William H. Taft, president of the commission, civil governor of the Philippine Islands from the 4th day of July, 1901.

“Such executive authority will be exercised under and in conformity to the instructions to the Philippine Commission, dated April seventh, nineteen hundred, and subject to the approval and control of the secretary of war of the United States.”

“An act to revise and amend the tariff laws of the Philippine Archipelago” was enacted by the Philippine Commission Sept. 17, 1901.

It fixed duties at specified rates, on all articles, goods and merchandise imported into the Philippine Islands, with a few articles in the free list; and it imposed export duties on hemp, indigo, rice, sugar, cocoanuts and tobacco manufactured or raw.

An act of Congress temporarily to provide revenue for the Philippine Islands and for other purposes, was approved March 8, 1902. It continued in force the tariff act of the United States Philippine Commission of Sept. 17, 1901, and provided that “There shall be levied, collected and paid upon all articles coming into the Philippine Archipelago from the United States, the rates of duty which are required to be levied, collected and paid upon like articles imported from foreign countries into

said archipelago;" and that "there shall be levied and collected and paid upon all articles coming into the United States from the Philippine Archipelago the rates of duty which are required to be levied, collected and paid upon like articles imported from foreign countries: Provided, that upon all articles the growth and product of the Philippine Archipelago coming into the United States from the Philippine Archipelago there shall be levied and collected and paid, only seventy-five per centum of the rates of duty aforesaid; and provided further that the rates of duty which are required hereby to be levied, collected and paid upon products of the Philippine Archipelago, coming into the United States shall be less any duty or taxes levied, collected and paid thereon upon the shipment thereof from the Philippine Archipelago as provided by the act of the United States Philippine Commission referred to in Section 1 of this Act, under such rules and regulations as the Secretary of the Treasury may prescribe, but all articles the growth and product of the Philippine Islands admitted into the ports of the United States free of duty under the provisions of this act and coming directly from said Islands to the United States for use and consumption therein shall be hereafter exempt from any export duties imposed in the Philippine Islands."

It was further provided "that the duties and taxes collected in the Philippine Archipelago in pursuance of this act and all duties and taxes collected in the United States upon articles coming from the Philippine Archipelago and upon foreign vessels coming therefrom, shall not be covered into the general fund of the treasury of the United States, but shall be held as a separate fund and paid into the Treasury of the Philippine Islands to be

used and expended for the government and benefit of said islands.”

“That no person in the Philippine Islands shall, under the authority of the United States, be convicted of treason by any tribunal, civil or military, unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

An Act of Congress temporarily to provide for the administration of the affairs of civil government in the Philippine Islands and for other purposes was approved July 1, 1902.

It approved, ratified and confirmed the executive orders of President McKinley, dated April 7, 1900, and June 21, 1901, and the creation of four executive departments of government in the Islands as set forth in an act of the Philippine Commission of September 6, 1901, organizing the departments of the interior, or commerce and police, of finance and justice, and of public instruction.

It further provided that “until otherwise provided by law the said Islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: ‘By authority of the United States be it enacted by the Philippine Commission.’ ”

It was declared that Section 1891 of the Revised Statutes of the United States should not apply to the Philippine Islands. That section reads:

“Sec. 1891. The constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized

territories and in every territory hereafter organized as elsewhere within the United States.”

The appointment of the Civil Governor, Vice-Governor, members of the said Commission and heads of executive departments, was vested in the President by and with the advice and consent of the Senate.

The action of the President in issuing his order of July 12, 1898, and the amendments thereof, and the action taken thereunder, were approved, ratified and confirmed, with a proviso that this should not be held to amend or repeal the Act of March 8, 1902.

The Bill of Rights and other provisions of the Constitution applicable to the Islands were made the supreme law, but as in the order of the President of April 7, 1900, the right to a jury trial, the right to bear arms, and the right to free trade with other parts of the United States were withheld.

Provision was made for representative government. When the then existing insurrection in the Islands should cease and a general and complete peace established, a census was directed to be taken, and two years after the completion and publication of the census, the President was authorized to direct the Philippine Commission to call “a general election for the choice of delegates to a popular assembly of the people of said territory in the Philippine Islands which shall be known as the Philippine Assembly.”

“Said Assembly shall consist of not less than fifty nor more than one hundred members, to be apportioned by said Commission, among the provinces as nearly as prac-

licable according to population; Provided, that no province shall have less than one member; and, Provided further, that provinces entitled by population to more than one member may be divided into such convenient districts as said Commission may deem best."

"After said Assembly shall be convened and organized all the legislative power heretofore conferred on the Philippine Commission in all parts of said Islands not inhabited by Moros or other non-Christian tribes shall be vested in a Legislature consisting of two houses—the Philippine Commission and Philippine Assembly."

Annual sessions and biennial elections and the election by the Legislature of two resident Commissioners to the United States were provided for. Courts were established with a right of review in the Supreme Court of the United States.

Thus we see that while Congress deferred the granting of representative government to the Philippine Islands, it made provision for it, and it cannot be said that Congress has shown any intention to permanently withhold from the people of the Philippine Islands any of constitutional rights of American citizens. Representative government is assured, and commercial freedom, and jury trials will follow in due season.

Give the Philippine Islands the same freedom of trade as prevails between the other Territories and the several States and the material prosperity which would follow would do more to make their inhabitants contented and patriotic citizens than any other thing Congress could do, and it would at the same time add to the prosperity of the whole country. Trade left to its natural channels is reciprocally advantageous. The Philippine Islands

can produce the very things needed by the other parts of the United States, and these can produce the very things needed in the Philippine Islands. Burdensome and ruinous State tariff laws were the principal grievance which made the Constitution of the United States with its commercial clauses possible, and there is no ground on which its beneficence can be denied to any territory within the national domain.

An Act temporarily to provide revenues and a civil government for Porto Rico and for other purposes was approved April 12, 1900. A temporary tariff between the States and Porto Rico was established but was not to continue beyond March 1, 1902, and provision was made for its earlier termination, and it was terminated, by a proclamation of the President issued July 1, 1901, to take effect July 25, 1901, which was the anniversary of the coming of the American flag to the island. Ample provision was made for a legislative assembly consisting of an executive council of eleven persons appointed by the President, at least five of whom to be native inhabitants and a house of delegates of thirty-five members elected in seven districts by popular vote.

Our examination of the territorial or colonial policy of the United States, as shown and recorded in the ordinance of 1787, and subsequent acts of Congress, leads to the conclusion that the principles of representative government and constitutional restraints, are so fixed in the minds of Americans that they are eventually extended to all new acquisitions of territory. For the more part this has been promptly done, and in no case has it been long delayed.

In the creation of territorial governments as well as in

the admission of new States, Congress does not delegate, except temporarily, its legislative power; it simply defines the territorial limits of each government organized; prescribes or approves the framework or structure of each new State or territorial government; and recognizes the inherent right of the people of the several subdivisions into which the country is thus divided, to govern themselves, in the management and conduct of their own local affairs, subject only in case of the states, to the limitations imposed by the Constitution of the United States, and in the case of the territories to such additional limitations as may be imposed by Congress.

It is this system of decentralized and thoroughly localized state and territorial governments which makes great territorial possessions, without tyranny, possible and qualifies the United States to acquire territory in any part of the world, where the national interests may be subserved, and the cause of representative government and constitutional freedom may be advanced.

Having considered the local self-government of the United States to the creation of territorial governments, and the admission of new states into the Federal Union, we will make a brief reference to the local self-government of the several states and territories, in the organization of townships and counties, villages and cities, and other taxative and legislative districts, such as school and highway districts. Here we find the principles of representative taxation and legislation have been almost universally observed, but in some instances they have been ignored and violated, and in some of the states the judiciary have not interposed to preserve to the people their ancient and inherent right to govern and tax themselves in the conduct of their own local affairs.

In other states the courts of last resort have had a clearer conception of the constitutional principles involved, and a higher appreciation of the importance of maintaining local rights as the most acceptable and efficient means of strengthening, not only the state governments, but that of the nation as well. Without the townships, villages, cities and counties the states and territories would lose a great deal of their vigor and efficiency; and without the states national government would speedily become tyrannical, oppressive and odious. Home rule as it exists in America is the strength and glory of the nation; it makes the government of vast dominions inhabited by millions upon millions of people possible, without the exercise of arbitrary and despotic power, which would be inevitable if the multitudinous affairs of the American people were governed and controlled by one general and central authority.

There is a general sentiment, which pervades both of the great political parties, and all classes of citizens, that the acquisition of the Philippine Islands was a mistake and that their independence should be declared and the forces of the United States withdrawn therefrom. I am of a contrary opinion. The completion of the Panama Canal makes it certain that the Pacific is speedily to become the greatest and most important of all the seas which are the highways of the nations, and on which float the commerce of the world.

The Philippine Islands in area are larger than the British Isles, or the four Japanese islands which are the main possessions of the Nipon Empire.

The natural and almost wholly undeveloped resources of the Philippine Islands are immense and are equal to those of any other region on earth of like area.

It is said that if we keep the islands we will have to maintain a large navy to protect them, which is true; but as long as all mankind are as warlike as they appear to be we will need a large navy, anyway. If the protection of the Pacific Coast were the only purpose of a navy, a small one would do; but the Pacific Ocean must be kept open and free for our trade and commerce, and it can only be done with a large and efficient navy. Japan holds Formosa, an island north of the Philippines, and Great Britain holds a predominating influence in northwest Borneo, not far to the southeast, with Australia and New Zealand to the south.

It is fortunate that the United States have ample possessions between these two great sea powers, but if we should abandon the Philippines they would become easy prey for the one or the other, or of Germany if she should obtain dominion of the seas. The United States in their own interests are bound to protect the Philippines whether they are independent or not. There is no way of escaping the burden unless we are willing to concede that we have no interest in the future commerce of the Pacific Ocean.

Local self-government should be extended to the Philippine Islands, in the same gradual and beneficent way it has been extended to our continental possessions, and ultimately the islands should be a state in our Federal Union, or have the same relations with the United States as Canada and Australia have with Great Britain, minus the power to levy tariff duties between the Islands and the United States.

Nations, like individuals and all animate creation, are engaged in a constant struggle for existence; and the United States, the greatest representative-democracy the

world has ever seen, are not prepared to give up, and like the defeated champions of old, cry "Craven."

There is still a stronger reason why the Philippine Islands should be retained. Thanks to the men who framed the Constitution of the United States, that instrument grants freedom of trade throughout the length and breadth of the land, and it is the great source of our prosperity and happiness.

If the Philippine Islands were independent, burdensome duties on exports to and imports from, the United States would be imposed, whereas the truth is, that the people of the United States are directly interested in having the utmost freedom of commerce between the two. The Philippine Islands produce the very things the one hundred millions of people in the states need, such as sugar, hemp and timber and the States produce the manufactures and capital, the Filipinos need. Exchange of these is mutually advantageous and it is a commerce that should be wholly unrestricted.

BIBLIOGRAPHY. Having traced in outline the history of representative government, from the woods of Germany before the Christian era, down to the present day in these United States, I will bring these lectures on the legislative to a close, by referring you to some other historical works illustrative of the general subject.

"A Student's Manual of English Constitutional History," by Dudley Julius Medley, Professor of History in the University of Glasgow, is a most excellent work for use in Law Schools. A fourth edition was published by B. H. Blackwell, Oxford, Eng., in 1907.

"A Short Constitutional History of England," by H. St. Clair Fielden, is valuable because of its classification of subjects, and its definitions and descriptions. Blackwell published a fourth edition in 1911.

"The Growth of the English Constitution," by Edward A. Freeman, the author of the History of the Norman Conquest of England, is very interesting because it brings out the democratic features of the English Constitution.

"Introduction to the Study of the Law of the Constitution," by A. V. Dicey, written from the legal standpoint, with but little reliance on the antiquarianism of Freeman and other historians. A sixth edition was published by MacMillan and Company of New York and London in 1902.

"The Law and Custom of the Constitution" in two volumes, by William R. Anson, is a standard work. A second edition was published by the Clarendon Press, Oxford, in 1892.

Last but not least of these English authors, you should read the lectures on the "Constitutional History of England," by Frederick W. Maitland, Professor of the Laws of England in the University of Cambridge, which after his death were published by the University Press, Cambridge, Eng.

"Commendaries on the Constitution of the United States," in 2 vols., by Joseph Story, an eminent associate justice of the Supreme Court of the United States. Read the dedication to Chief Justice Marshall, and the preface. A fourth edition with notes and additions by Thomas M. Cooley, was published by Little, Brown & Company of Boston, in 1873.

"The Origin and Growth of the English Constitution," in 2 vols., by Hannis Taylor, "in which is drawn out by the light of the most recent researches, the gradual development of the English constitutional system, and the growth out of that system of the Federal Republic of the United States;" and his "The Origin and Growth of the American Constitution," in 1 vol., are the most learned and exhaustive historical treatises covering the whole subject of American constitutional history and law yet produced.

These lectures are nothing more than a crude introduction to the works of Mr. Taylor.

There are other works too numerous to mention. I have referred you in the course of these lectures to enough to occupy your leisure hours for the next ten years.

XIV.

THE LEGISLATIVE.

(Continued.)

The New York Charters of Liberty of 1683 and 1691—Objections on which the Duke of York as Jas. II. annulled the act of 1683—Adverse report of Lords of Trade on which William III, repealed the act of 1691—Legislative forms.

It would be a mistake to close these lectures on the legislative without calling the attention of the class and my readers to the first American attempt to establish a written constitution with restrictions on the powers of the government.

Col. Thomas Dongan, a Catholic of good judgment and genteel manners, was commissioned as governor of New York Sept. 30, 1682. The written instructions accompanying his commission authorized him, among other things, to appoint a council of not more than ten, and with the advice of the council to summon "a general assembly of all the freeholders, by the persons who they shall choose to represent them," not exceeding eighteen.

Under this authority Governor Dongan did call such an assembly, which began its first session at Fort James in New York City Oct. 17, 1683. The first act it passed was given the title of a charter of liberties in the hope that it would be approved by the Duke of York, and would not be repealed by King Charles II.

The journal of this assembly is not in existence, and the names of the members are not known, further than that Mathias Nicolls was elected speaker. The proposed

charter of liberties was his work in the main, and if not, then of some equally capable and experienced English member.

Two-thirds of the members were Dutch, and the others were Englishmen from New York City and Long Island. As Mathias Nicolls, signed the act as speaker, it is proper to give him credit for it as the historians do. His public services to the colony show that he was well qualified to frame an act setting forth the rights of the people of the colony as subjects of the King of England.

Mathias Nicolls (1630-1687) was a barrister in Lincoln's Inn when he was appointed by Charles II. in 1664 secretary of the commission, and a captain in the forces, under Col. Richard Nicolls, who was sent out to capture New Netherlands from the Dutch. Mathias Nicolls served continuously as secretary of the province, was a member of the governor's council, presiding judge of the Provincial Court of Assizes, and he also sat with the justices in the minor courts of session; he was the third Mayor of New York City, and the first judge of the Court of Common Pleas in that city; was speaker of the first and second legislative assemblies and one of the judges of the Supreme Court of the colony. The first service he appears to have rendered was that of preparing the code of laws for New York, known as "The Dukes' Laws," which were approved by the Duke, and were promulgated by Governor Richard Nicolls, at Hempsted March 1, 1665. These laws were compiled from the law of England, the Dutch law of New Netherlands, and the laws and regulations of the New England colonies, and they have been deservedly characterized as "a liberal, just and sensible body of laws." (4 Appelton's Am. Biog., 517.)

THE CHARTER OF LIBERTYES AND PRIVILEGES GRANTED
BY HIS ROYALL HIGHNESSE TO THE INHABITANTS OF
NEW YORKE AND ITS DEPENDENCYES.

[Passed, October 30, 1683.]

ffor The better Establishing the Government of this province of New Yorke and that Justice and Right may be Equally done to all persons within the same.

BEE It Enacted by the Governour Councell and Representatives now in Generall Assembly mett and assembled and by the authority of the same.

THAT The Supreme Legislative Authority under his Majesty and Royall Highnesse James Duke of Yorke Albany &c Lord proprietor of the said province shall forever be and reside in a Governour, Councell, and the people mett in Generall Assembly.

THAT The Exercise of the Cheife Magistracy and Administracon of the Government over the said province shall bee in the said Governour assisted by a Councell with whose advice and Consent or with at least four of them he is to rule and Governe the same according to the Lawes thereof.

THAT in Case the Governour shall dye or be absent out of the province and that there be noe person within the said province Comissionated by his Royal Highnesse his heires or Successours to be Governour or Comander in Cheife there That then the Councell for the time being or Soe many of them as are in the Said province doe take upon them the Administracon of the Governour and the Execucon of the Lawes thereof and powers and authorityes belonging to the Governour and Councell the first in nominacon in which Councell is to preside untill the said Governour shall returne and arrive in the said province again, or the pleasure of his Royall Highnesse his heires or Successours Shall be further knowne.

THAT According to the usage Custome and practice of the Realme of England a sessions of a Generall Assembly be held in this province once in three yeares at least.

THAT Every ffreeholder within this province and ffreeman in any Corporacon Shall have his free Choise and Vote in the Electing of the Representatives without any manner of constraint or Imposicon. And that in all Elecons the Majority of Voices shall carry itt and by ffreeholders is understood every one who is Soe understood according to the Lawes of England.

THAT the persons to be Elected to sitt as representatives in the Generall Assembly from time to time for the severall Cittyes townes Countyes Shires or Divisions of this province and all places within the same shall be according to the porcon and number hereafter Expressed that is to say for the Citty and County of New Yorke four, for the County of Suffolke two, for Queens County two, for Kings County two, for the County of Richmond two for the County of West Chester two, for the County of Ulster two for the County of Albany two and for Schnectade within the said County one for Dukes County two, for the County of Cornwall two and as many more as his Royall Highnesse shall think fitt to Establish.

THAT All persons Chosen and Assembled in manner aforesaid or the Major part of them shall be deemed and accounted the Representatives of this province which said Representatives together with the Governour and his Councell Shall forever be the Supreame and only Legislative power under his Royall Highnesse of the said province.

THAT The said Representatives may appoint their owne Times of meeting dureing their sessions and may adjourne their house from time to time to such time as to them shall seeme meet and convenient.

THAT The said Representatives are the sole Judges of the Qualificacons of their owne members, and likewise of all undue Elecons and may from time to time purge their house as they shall see occasion dureing the said sessions.

THAT noe member of the gernal Assembly or their servants dureing the time of their Sessions and whilst they shall be goeing to and returning from the said Assembly shall be arrested sued imprisoned or any wayes molested or troubled nor be compelled to make answeere to any suite, Bill, plaint,

Declaracon or otherwise, (Cases of High Treason and felony only Excepted) provided the number of the said servants shall not Exceed three.

THAT All bills agreed upon by the said Representatives or the Major part of them shall be presented unto the Governour and his Councell for their Approbacon and Consent, All and Every which Said Bills soe approved of Consented to by the Governour and his Councell shall be Esteemed and accounted the Lawes of the province, Which said Lawes shall continue and remaine of force untill they shall be repealed by the authority aforesaid that is to say the Governour Councell and Representatives in General Assembly by and with the Approbacon of his Royal Highnesse or Expire by their owne Limitacons.

THAT In all Cases of death or removall of any of the said Representatives The Governour shall issue out Sumons by Writt to the Respective Townes Cittyes Shires Countryes or Divisions for which he or they soe removed or deceased were Chosen willing and requireing the ffreeholders of the Same to Elect others in their place and stead.

THAT Noe freeman shall be taken and imprisoned or be disseized of his ffreehold or Libertye or ffree Customes or be outlawed or Exiled or any other wayes destroyed nor shall be passed upon adjudged or condemned But by the Lawfull Judgment of his peers and by the Law of this province. Justice nor Right shall be neither sold denied or deferred to any man within this province.

THAT Noe aid, Tax, Tallage, Assessment, Custome, Loane, Benevolence or Imposicon whatsoever shall be layed assessed imposed or levyed on any of his Majestyes Subjects within this province or their Estates upon any manner of Colour or pretence but by the act and Consent of the Governour Councell and Representatives of the people in Generall Assembly mett and Assembled.

THAT Noe man of what Estate or Condicon soever shall be putt out of his Lands or Tenements, nor taken, nor imprisoned,

nor disherited, nor banished nor any wayes distroyed without being brought to Answer by due Course of Law.

THAT A ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize And none of the said Amerciaments shall be assessed but by the oath of twelve honest and Lawfull men of the Vicinage provided the faults and misdemeanours be not in Contempt of Courts of Judicature.

ALL Tryalls shall be by the verdict of twelve men, and as neer as may be peers or Equalls And of the neighbourhood and in the County Shire or Division where the fact Shall arise or grow Whether the Same be by Indictment Infermacon Declaracon or otherwise against the person Offender or Defendant.

THAT In all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence and then twelve men of the neighbourhood to try the Offender who after his plea to the Indictment shall be allowed his reasonable Challenges.

THAT In all Cases whatsoever Bayle by sufficient Suretyes Shall be allowed and taken unless for treason or felony plainly and specially Expressed and menconed in the Warrant of Commitment provided Alwayes that nothing herein contained shall Extend to discharge out of prison upon bayle any person taken in Execucon for debts or otherwise legally sentenced by the Judgment of any of the Courts of Record within the province.

THAT Noe ffreeman shall be compelled to receive any Mariners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province.

THAT Noe Comissions for proceeding by Marshall Law against any of his Majestyes Subjects within this province shall issue forth to any person or persons whatsoever Least by Colour of them any of his majestyes Subjects bee destroyed or putt to death Except all such officers persons and Souldiers in pay throughout the Government.

THAT from hence forward Noe Lands within this province shall be Esteemed or accounted a Chattle or personall Estate but an Estate of Inheritance according to the Custome and practice of his Majestyes Realme of England.

THAT Noe Court or Courts within this province have or at any time hereafter Shall have any Jurisdiccon power or authority to grant out any Execucon or other writt whereby any mans Land may be sold or any other way disposed off without the owners Consent provided Alwayes That the issues or meane proffitts of any mans Lands shall or may be Extended by Execucon or otherwise to satisfye just debts Any thing to the Contrary hereof in any wise Notwithstanding.

THAT Noe Estate of a feme Covert shall be sold or conveyed But by Deed acknowledged by her in Some Court of Record the Woman being secretly Examined if She doth it freely without threats or Compulsion of her husband.

THAT All Wills in writeing attested by two Credible Witnesses shall be of the same force to convey Lands as other Conveyances being registered in the Secretaryes Office within forty dayes after the testators death.

THAT A Widdow after the death of her husband shall have her Dower And shall and may tarry in the Cheife house of her husband forty dayes after the death of her husband within which forty dayes her Dower shall be assigned her And for her Dower shall be assigned unto her the third part of all the Lands of her husband dureing Coverture, Except shee were Endowed of Lesse before Marriage.

THAT All Lands and Heritages within this province and Dependencies shall be free from all fines and Lycences upon Alienacons, and from all Herriotts Ward Shipps Liveryes primer Seizins yeare day and Wast Escheats and forfeitures upon the death of parents and Ancestors naturall unnaturall casuall or Judiciall, and that forever; Cases of High treason only Excepted.

THAT Noe person or persons which professe ffaith in God by Jesus Christ Shall at any time be any wayes molested punished

disquieted or called in Question for any Difference in opinion or Matter of Religious Concernment, who doe not actually disturb the Civill peace of the province, But that all and Every such person or persons may from time to time and at all times freely have and fully enjoy his or their Judgments or Consciencies in matters of Religion throughout all the province, they behaveing themselves peaceably and quietly and not using this Liberty to Lycentiousnesse nor the civill Injury or outward disturbance of others provided Alwayes that this liberty or any thing contained therein to the Contrary shall never be Construed or improved to make void the Settlement of any publique Minister on Long Island Whether Such Settlement be by two thirds of the voices in any Towne thereon which shall alwayes include the Minor part Or by Subscripcions of perticuler Inhabitants in Said Townes provided they are the two thirds thereon Butt that all such agreements Covenants and Subscripcions that are there already made and had Or that hereafter shall be in this Manner Consented to agreed and Subscribed shall at all time and times hereafter be firme and Stable And in Confirmacon hereof It is Enacted by the Governour Councill and Representatives; That all Such Sumes of money soe agreed on Consented to or Subscribed as aforesaid for maintenance of said publick Ministers by the two thirds of any Towne on Long Island Shall alwayes include the Minor part who shall be regulated thereby And also Such Subscripcions and agreements as are before menconed are and Shall be always ratified performed and paid, And if any Towne on said Island in their publick Capacity of agreement with any Such minister or any perticuler persons by their private Subscripcions as aforesaid Shall make default deny or withdraw from Such payment Soe Covenanted to agreed upon and Subscribed That in Such Case Upon Complaint of any Collector appointed and Chosen by two thirds of Such Towne upon Long Island unto any Justice of that County Upon his hearing the Same he is here by authorized empowered and required to issue out his warrant unto the Constable or his Deputy or any other person appointed for the Collection of Said Rates or agreement to Levy upon the

goods and Chattles of the Said Delinquent or Defaulter all such Sumes of money Soe covenanted and agreed to be paid by distresse with Costs and Charges without any further Suite in Law Any Lawe Custome or usage to the Contrary in any wise Notwithstanding.

PROVIDED Alwayes the said sume or sumes be under forty shillings otherwise to be recovered as the Law directs.

AND WHEREAS All the Respective Churches now in practice within the City of New Yorke and the other places of this province doe appeare to be priviledged Churches and have beene Soe Established and Confirmed by the former authority of this Government BEE it hereby Enacted by this Generall Asembly and by the authority thereof That all the Said Respective Christian Churches be hereby Confirmed therein And that they and Every of them Shall from henceforth forever be held and reputed as priviledged Churches and Enjoy all their former freedoms of their Religion in Divine Worshipp and Church Discipline And that all former Contracts made and agreed upon for the maintenances of the severall ministers of the Said Churches shall stand and continue in full force and virtue And that all Contracts for the future to be made Shall bee of the same power And all persons that are unwilling to performe their part of the said Contract Shall be Constrained thereunto by a warrant from any Justice of the peace provided it be under forty Shillings or otherwise as this Law directs provided allsoe that all Chrisian Churches that Shall hereafter come and settle within this province shall have the Same Priviledges.—(From Colonial Laws of New York, Vol. 1, 1664-1719, pp. 111-116.)

The New York Charter of Liberties is the first really great instrument in American constitutional history. The compact on the Mayflower, the ordinance of the Virginia Company of London for the government of Virginia, and the fundamental orders of Connecticut are noteworthy, but they did nothing more than fix the form or frame of

the government, without imposing any constitutional restrictions thereon.

The New York Charter of Liberties was a bold and very able attempt to establish a representative government and to place limitations on its power; in short, to create a constitutional republic; and challenges our admiration, not only because it was framed nearly a hundred years before the American Revolution of 1776, and five years before the English Revolution of 1688, but also because of the accuracy and clearness with which it declares and enunciates those great and enduring principles of civil and religious liberty, which are sought to be preserved by the written constitutions, state and federal, of the United States.

The New York Charter of Liberties unequivocally provides for representative taxation and legislation; it provides that no man shall be "adjudged or condemned but by the lawful judgment of his peers, *and* by the law of this province," or "without being brought to answer by due course of law;" it adopts the rules and methods of Magna Carta for securing reasonable amercements; it provides for presentiments and trials by grand and petit juries of the vicinage; it prohibits the quartering of soldiers in the houses of the people, and it enforces religious freedom.

The New York Charter of Liberties is certainly a most interesting document; it is our first great constitutional landmark; it was the forerunner of the state and federal constitutions of a century later; and too much cannot be said in praise of the first legislative assembly in New York, and in honor of its speaker, Mathias Nicolls. Nor can we withhold admiration for Thomas Dongan, who as

the governor of the province appointed by the Duke of York, approved the Charter of Liberties in December, 1683, and sent it to England by Capt. Mark Talbot for confirmation by the Duke.

“After long consideration and apparently after some amendments had been made, the Duke says Chalmers (*Political Annals*, p. 588) ‘actually signed’ the patent, ‘which only required some trivial solemnity to render it complete and irrevocable.’ ”

The Duke of York signed and sealed the instrument on October 4, 1684; it was countersigned by his secretary, Sir John Werden, and sent the same evening to the auditor (Mr. Aldworth) to be registered by him and then to be delivered to Capt. Talbot to carry to New York. (*Historical Magazine*, August 1862, Vol. 6, p. 233.)

There was some delay, and before the charter had started across the Atlantic on what would have been a voyage and mission of liberty and freedom, Charles II. died, Feb. 6, 1684-5, and the Duke of York became King of England as James II. The Duchy of New York was merged in the kingship, and from thenceforth until American independence New York was a royal province.

James II. started on that stupid and foolish career which was to cause him in four years to lose the crown of England, by annulling the New York Charter of Liberties, which he had previously signed.

The following objections to the charter were read before the king, and the committee of trade and plantations in the council chamber, at Whitehall March 3, 1684-5, and they are here inserted, as of historical inter-

est, and as illustrative of that short-sighted policy of the King and Parliament which caused the English colonies in America to seek their independence; and mainly because the mother country denied to the people of the colonies those constitutional rights and safeguards, which the English at home had secured for themselves.

OBSERVATIONS UPON THE CHARTER OF THE PROVINCE OF
NEW YORK.

(3 Doc. Col. His. New York, p. 357.)

Observations Upon the Charter of New York.

Charter. That the Inhabitants of New York shall be governed by and according to the Laws of England.

Observation. This Priviledge is not granted to any of his Ma^{ts}. Plantations where the Act of Habeas Corpus and all such other Bills do not take Place.

Chart. Sheriffs and other Officers of Justice to be appoint— with like power as in England.

Obs. This is not so distinctly granted or practised in any other Plantation.

Char. That the Supreme Legislative Authority shall remain in the Governor, councill and the People mett in Genⁿ. Assembly.

Obs. The Words The People met in a General Assembly are not used in any other Constitution in America; But only the Words General Assembly.

Char. The Exercise of the Chief Magistracy and Administration of the government shall be in the Gov^r assisted by a Council; with whose advice and consent he shall and may govern and rule the said Province according to the laws established.

Obs. If this oblige and restrain the Gov^r from doing anything without the Councill it is a greater restraint than any other Gov^r is subject to.

Charter. That according to the usage and practice of the kingdom of England there shall be a sessions of a General Assembly to be called to meet once in 3 Years or oftener.

Observations. This is an Obligation upon the government greater than has been ever agreed to in any other Plantation.

And the grant of such a privilege has been rejected elsewhere, notwithstanding a Revenue offered to induce it.

Char. Which Representatives of the Province with the Governor and his Council shall be the Supream and only legislative power of the said province.

Obs. Whether this does not abridge the Acts of Parliament that may be concerning New York.

Char. That all Bills agreed upon by the Said Representatives shall be presented by them to the Governor and Council for the time being for their Approbation and Consent.

Obs. This seems to take away from the Governor and Council the power of framing Laws as in other Plantations.

Char. Which Bills so approved shall be deemed a Law for the space of two years, unless the Lord Proprietor shall signify his dissent within that time. That in case the Lord Proprietor shall confirm the Laws within that time, they shall continue in force untill repealed by the Assembly. That in Case of Dissent or Determination of two years they shall be void.

Obs. This Term of years does abridge the King's power, and has been thought inconvenient in other Plantations, and is different from Colonel Dongan's Instructions.

Chart. No person shall be admitted to sitt in the Assembly until he hath taken the Oaths of Allegiance and Fidelity to the Lord Proprietor.

Obs. This must be altered at present.

Chart. And by his submission and peacable behaviour hath demonstrated his affection to the Government.

Obs. This seems to be restrained by what follows:

Chart. That the Assembly shall with the Consent of the Governor judge of undue elections, and of the qualifications of the Representatives; and with the like consent to purge their house, and expell any member as they shall see occasion.

Obs. This may be inconvenient, and is not practiced in some other plantations.

Char. That the forfeiture for not making due Entries shall be applyed, one third to the Lord Proprietor, one third to the Governor, and one third to the Informer.

Obs. The Application to the Gov^r is unusual.

Char. That all Christians shall enjoy Liberty of Conscience so they do not disturb the peace.

Obs. This is practised in the Proprieties.

Char. That every publick Minister upon Long Island shall be maintained according to the subscriptions: That all Contracts made in New York for the maintenance of the severall ministers shall be made good.

Obs. This is agreeable to the Practice of New England, but not of his Ma^{ts}. other Plantations.

Endorsed

Observations upon the Charter of New York.

Read 3 Mar. 8 4/5.

The English revolution of 1688 had its counterpart in the revolt led by Jacob Leisler, who proclaimed the Prince of Orange as King of England, fortified the lower end of Manhattan Island, since known as the "Battery;" and as he at first refused to recognize Henry Sloughter, a worthless fellow who had been sent over as Governor, refused to surrender the fort and fired on the royal troops, he and Milborne, his secretary and chief abettor, were convicted of treason and executed May 16, 1691,

on the site now occupied by the building of the New York World.

Sloughter had called an assembly, and three days before the execution passed "an act declaring what are the rights and privileges of their Majesties subjects inhabiting within their province of New York."

This act re-enacted the Charter of Liberties of 1683, but added two obnoxious clauses.

The first of these reads:

"That no person of what degree of condition soever, throughout this Province, chosen, appointed or commissioned to officiate or execute any office, or place, civil or military within the Province, etc., shall be capable in the law to take upon him the charge of such before he hath first taken the oaths appointed by Act of Parliament to be taken in lieu of oaths of supremacy and allegiance, and subscribed the Test.

The other obnoxious clause was the proviso to the provision for religious toleration. It reads:

"Always provided that nothing herein mentioned or contained shall extend to give liberty to any persons of the Romish religion to exercise their manner of worship, contrary to the laws and statutes of this their majesties Kingdom of England."

The act of May 13, 1691, remained in force for six years, as it was not repealed by William III. until May 11, 1697, when the Lords of Trade made an adverse report thereon, to the effect that it gave "unto the representatives of that province too great and unreasonable privileges during the sitting of the assembly; and to all inhabitants (except inn holders) such an exemption from the quartering of soldiers as we conceive may be inconvenient to his Majesty's service there, and contains also several large and doubtful expressions."

LEGISLATIVE FORMS.

It has been my intention to deliver a separate lecture on the restrictions placed by many state constitutions on the forms to be observed by the Legislature in the enactment of laws, but I now deem it advisable to only call your attention to main features of the subject.

The Michigan constitution of 1850 has the following provisions, which have been retained by the constitution of 1908:

“No law shall embrace more than one object, which shall be expressed in its title.”

“No law shall be revised, altered or amended by reference to its title only, but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length.”

“The style of the laws shall be: ‘The People of the State of Michigan enact.’ ”

The Michigan constitution of 1908 contains the following additional restrictions:

ARTICLE VII.

Sec. 1. The judicial power shall be vested in one Supreme Court, Circuit Courts, Probate Courts, Justices of the Peace, and such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the Legislature may establish by general law, by a two-thirds vote of the members elected to each House.

ARTICLE VIII.

Sec. 6. The Legislature shall by **general law** provide for the appointment of a Board of Jury Commissioners in each county; but such law shall not become operative in any county until a majority of the electors voting thereon shall so decide.

Sec. 8. The Legislature may by **general law** confer upon Boards of Supervisors of the several counties such powers of a local legislative and administrative character not inconsistent with the provisions of this Constitution, as it may deem proper.

Sec. 17. The Legislature may by **general law** confer upon organized townships such powers of a local legislative and administrative character not inconsistent with the provisions of this Constitution, as it may deem proper.

Sec. 20. The Legislature shall provide by a **general law** for the incorporation of cities, and by a **general law** for the incorporation of villages; such **general laws** shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

“Section 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and through its regularly constituted authority, to pass all laws and ordinances **relating to its municipal concerns**, subject to the constitution and general laws of this state.”

Sec. 26. The Legislature may by **general law** provide for laying out, construction, improvement and maintenance of highways, bridges and culverts by counties, districts and townships; and may authorize counties or districts to take charge and control of any highways within their limits for such purposes. The Legislature may also by **general law** prescribe the powers and duties of Boards of Supervisors in relation to highways, bridges and culverts, etc.

Sec. 30. The Legislature shall pass no **local or special** act in any case where a **general act** can be made applicable and whether a **general act** can be made applicable shall be a judi-

cial question. No local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected.

These restrictions were borrowed in part from other states and would bear the construction placed on them by the weight of authority in the states from which they were borrowed, if it were not for the fact that the Michigan constitution has made additions which permit, if they do not compel, a different construction of the several provisions when considered in their entirety, than the borrowed parts have received in other states.

It is obvious that the main object and purpose of requiring the Legislature to enact general laws is to secure uniformity throughout the state, and the judgment of the full membership of the State Legislature when it enacts such a law. Yet, in a number of states it has been held that in a general law for the incorporation or government of cities, it is competent to classify cities according to their population, and to have a different law for each class, thereby permitting that diversity of law the constitution was designed to prevent.

The Michigan constitution of 1908 has a much better way of securing such diversity of municipal organization and government, for it provides that subject to the general law for the incorporation of cities and to the constitution and the other general laws of the state, "the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village, and through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns."

It remains to be seen what construction the Supreme Court of Michigan will place on the provisions of the constitution of 1908 requiring general laws.

The decisions in other states are very conflicting; the subject is intricate; and at some time in the future you will have occasion to dig into it.

My purpose in these lectures on the legislative has been to trace the origin and development and to show the nature of the legislative power as it exists in these United States of America, and to bring before you the great historical documents which illustrate the subject.

BIBLIOGRAPHY. "History of the State of New York," in two volumes by John Romeyn Brodhead, published in 1853, was written after the author had passed three years in the archives of Holland, England and France as the agent of the State of New York to procure or transcribe documents in Europe relating to the history of the State, with the result that he obtained over 5,000 important papers, which were published in eleven quarto volumes by Act of the State Legislature.

"A History of New York from the beginning of the world to the end of Dutch Dynasty," by Diedrich Knickerbocker, written by Washington Irving and published in 1848 made it's author famous and started him on a successful literary career. It is a comic history dealing with the main historical facts and the manners and methods of the people of that New Amsterdam which became the great City of New York.

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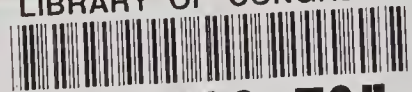




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